Supreme Court, U.S.
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In the Supreme Court of the United States
October Term, 1999

DR. PHILIP R. B. MCMASTER,

Petitioner

v.

**UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
FISH AND WILDLIFE SERVICE, ET. AL,**

Respondents

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. **Whether Congress Intended that the Quiet Title Act, 29 U.S.C. § 2409a, Be Broadly Construed to Grant the Federal Courts Jurisdiction to Adjudicate Any Suit in Which the Plaintiff Claims a Legally-Enforceable Interest in Real Property, Adverse to the United States' Interest in the Same Real Property.**

2. **Whether the Court of Appeals for the Eleventh Circuit Erred in Construing the Government's Motion to Dismiss as "Factual" Rather Than "Facial."**

3. **Whether the Court of Appeals for the Eleventh Circuit Erred in Engaging, Sua Sponte, in a "Factual Attack" On the Court's Subject Matter Jurisdiction.**

4. **Whether the Court of Appeals for the Eleventh Circuit Erred in Declining Either to Grant Petitioner A Presumption that the Allegations in His Complaint Were Truthful, or To Construe His Complaint in the Light Most Favorable to the Petitioner.**

LIST OF ALL PARTIES TO THE PROCEEDING

Plaintiff:	**Dr. Philip R.B. McMaster**
Defendants:	**United States of America, Department of the Interior, Fish and Wildlife Service**
	Mollie H. Beattie (since deceased), in her official capacity as Director, United States Fish & Wildlife Service
	John G. Rogers, in his official capacity as Deputy Director, United States Fish & Wildlife Service
	Noreen K Clough, in her official capacity as Regional Director, United States Fish & Wildlife Service
	Sam O. Drake, Jr., in his official capacity as Refuge Manager, Savannah Coastal Refuges, United States Fish & Wildlife Service

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I. CITATIONS TO OPINIONS AND ORDERS ENTERED IN THE CASE

The May 28, 1999 order of the United States Court of Appeals for the Eleventh Circuit, vacating an award of summary judgment in favor of the United States and remanding the matter to the district court with instructions to dismiss the action for want of subject matter jurisdiction, appears in the appendix hereto at p.71.

The September 1, 1999 order of the United States Court of Appeals for the Eleventh Circuit, denying Petitioners' Petition for Rehearing appears in the appendix hereto at p. 82.

II. STATEMENT OF THE BASIS FOR JURISDICTION

On May 28, 1999, the United States Court of Appeals for the Eleventh Circuit vacated an award of summary judgment in favor of the United States and remanded the matter to the district court with instructions to dismiss the action for want of subject matter jurisdiction. Subsequently, Petitioner filed in the Eleventh Circuit a Petition for Rehearing which was denied on September 1, 1999. This Court has jurisdiction to review the Eleventh Circuit's order of May 28, 1999 pursuant to 28 U.S.C. Section 1254(1).

III. STATUTORY AUTHORITIES INVOLVED IN THE CASE

The statutory provision involved in this case is the Quiet Title Act, 28 U.S.C.A. § 2409a, which provides as follows:

> § 2409a. Real property quiet title actions
>
> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).
>
> (b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person deter-

mined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff

or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be--

> (1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or
>
> (2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days

before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

IV. STATEMENT OF THE CASE

Petitioner appeals from the decision of the court below dismissing Petitioner's complaint.

This action concerns Wassaw Island, a nature refuge managed by the United States Fish and Wildlife Service (USFWS). Dr. McMaster claims an interest in the Island through his capacity as a beneficiary of the Wassaw Island Trust. The Trust owns a section of Wassaw Island known as the "Home Parcel;" Dr. McMaster has a fractional interest in this parcel as well as a right to use the Home Parcel for recreational purposes and to use certain easements through the refuge expressly reserved for the benefit of the Trust beneficiaries.

Dr. McMaster has at all relevant times been a beneficiary of the Wassaw Island Trust, which was created in 1930. The government acquired title to the property through a series of conveyances in 1969 which, in addition to placing certain restrictions upon the government's use of the Island, created the Home Parcel and reserved the easements for the benefit of the Trust beneficiaries. Since that conveyance, the government has claimed the right to ignore the restrictions against camping, campfires and recreational hunting as well as the right to restrict the beneficiaries' access to the expressly reserved easements.

On May 20, 1996, Dr. Philip McMaster filed the Complaint for this action in the United States District Court for the Southern District of Georgia. The Complaint alleged that the United States Fish and Wildlife Service (USFWS) had failed to uphold restrictions

placed upon its use of Wassaw Island when it acquired the Island from the Wassaw Island Trust through the Nature Conservancy. Specifically, the Complaint alleged that at the time of transfer, there was a collateral agreement that prohibited the government from allowing overnight camping or campfires on the Island. This provision, along with a covenant in the deed prohibiting hunting except when required to reduce overabundance of mammals, was breached in 1994 when the USFWS began sponsoring large scale recreational hunts on the Island. Hunters were allowed to camp overnight and maintain campfires as part of these hunts.

The government filed its answer to Dr. McMaster's complaint on July 19, 1996, denying the substance of the Complaint. On September 12, 1996, the government filed a motion to dismiss, alleging that the Complaint had failed to state a claim under the Quiet Title Act upon which relief could be granted and, in the alternative, that Dr. McMaster did not have standing to sue. **(App., p. 82)** This motion was denied by the District Court in an Order dated April 4, 1997. **(App., p.30).**

On March 31, 1997, Dr. McMaster filed a Motion for Partial Summary Judgment asking the court to rule that the collateral agreement preventing camping and campfires on Wassaw Island was a valid agreement under Georgia law that bound the government and that the government was equitably estopped from denying the agreement. On the same day, the government filed its Motion for Summary Judgment, arguing that the collateral agreement could not be enforced and that the recreational hunts sponsored by the government were designed to reduce an overabundance of deer and did not violate the deed.

On May 23, 1997, the District Court issued its judgment with accompanying Order, denying Dr. McMaster's motion and granting the government's motion. **(App., p. 39)** Dr. McMaster filed a Motion for Reconsideration of that judgment on June 6, 1997, pursuant to Fed. R. Civ. Pro. 59(e) requesting that the District Court reconsider its ruling on the agreement to prohibit camping and campfires as well as its disposition, without analysis, of Dr. McMaster's claim that the recreational hunts sponsored by the USFWS violated the express provisions of the deed. The District Court denied Dr. McMaster's motion in an Order dated July 28, 1997. **(App., p.55)** Dr. McMaster filed a timely Notice of Appeal to the Court of Appeals for the Eleventh Circuit.

On May 28, 1999, a three-judge panel of the Court of Appeals for the Eleventh Circuit denied Dr. McMaster's appeal. The panel ruled that the district court did not have subject matter jurisdiction to hear this suit. The panel vacated the district court's award of summary judgment for the government and remanded "to the district court with instructions to dismiss this action for lack of subject matter jurisdiction." **(App.,p.71)**

On July 8, 1999, Dr. McMaster filed with the Court of Appeals for the Eleventh Circuit a Petition for Rehearing (Or Hearing) En Banc. On September 1, 1999, the Court of Appeals denied the Petition for Rehearing. **(App.,p.82)**

V. REASONS FOR ALLOWING THE WRIT

A. The United States Court of Appeals for the Eleventh Circuit has entered a decision in conflict with decisions of several other United States Courts of Appeals on the same important matter, and has decided an important question of federal law that has not been, but should be, settled by this Court.

The Court of Appeals construed the Quiet Title Act (QTA) in a manner that conflicts with applicable authority in both the Eleventh Circuit and within the First, Second, Fourth, Eighth, and Ninth Circuits. Failure to correct this error of law would create precedent that conflicts with both the legislative intent behind the QTA and with other judicial determinations of the scope of the QTA. Moreover, the Court of Appeals' decision effectively denies any remedy to persons, such as Dr. McMaster, who have negotiated in good faith with the United States for the imposition of covenants on the use of land donated to the federal government, and who have thereafter suffered a willful breach of those covenants by the government.

The Court's decision would severely limit cases that would fall within the QTA. That result is directly contrary to the Congressional intent that the QTA have a broad scope, applying even to cases that would not have been considered quiet title actions at common law:

> Perhaps the most common application of the proposed statute would be in boundary disputes between

> the United States and owners of adjacent property. The quieting of title where the plaintiff claims an estate less than a fee simple--an easement or the title to minerals--is likewise included in the terms of the proposed statute.
>
> House Report No 92-1559, reprinted at 1972 USCCAN, p. 4547, 4551-52. See also United States of America v. Bedford Associates, 657 F.2d 1300 (2nd Cir. 1981) ("[T]he legislative history shows that Congress used the concept of 'quieting title' as a shorthand for almost any variety of suit concerning interests in land . . ..").

Nor have judicial interpretations of the QTA limited the Act to cases where fee simple ownership of land is at issue. See Lombard v. United States, 1999 WL 959550 (1st Cir. 1999) (Quiet Title Act jurisdiction to settle fractional claims of numerous heirs who claimed to be both tenants in common with the United States and partial owners of easement to reach family cemetery); Leisnoi, Inc. v. United States, 170 F.3d 1188 (9th Cir. 1999) (Quiet Title Act jurisdiction to cure cloud on title caused by a third- party's assertion that United States has adverse claim to property); Adams v. United States, 3 F.3d 1254 (9th Cir. 1993) (Quiet Title Act jurisdiction to determine an easement by necessity); Patterson v. Buffalo National River, 76 F.3d 221 (8th Cir. 1996) (Quiet Title Act jurisdiction to determine the existence of an easement by necessity/implication); Michel v. United States, 65 F.3d 130 (9th Cir. 1995) (Quiet Title Act jurisdiction to adjudicate suit seeking right of access across government land); County of Patrick, Va. v. United States, 596 F.2d 1186 (4th Cir. 1979) (upholding plaintiff's challenge under the QTA that the government had impermissibly interfered

with their easement); Fulcher v. United States of America, 632 F.2d 278 (4th Cir. 1980).

Indeed, the Court's strict application of the QTA only to disputes over fee simple title directly conflicts with other decisions within the Eleventh Circuit itself. See Werner v. United States, 9 F.3d 1514 (11th Cir. 1993). The Werner Court stated, in the context of a discussion of the statute of limitations contained in § 2409a(g), that "[p]laintiffs do not dispute the government's ownership, nor do they deny that they knew the government was owner of the land [at issue]." Id. at 1516. (allowing plaintiffs to proceed with their claim for an easement by necessity to allow them to use road across an air force base after the government had restricted their access).

According to the Court of Appeals in this case, the QTA permits "'adjudications only when the title or ownership of real property is in doubt' as between the plaintiff and the United States." Decision at 8. The Court cited Cadorette v. United States, 988 F.2d 215 (1st Cir. 1993) for that proposition. However, that citation overlooked the limited scope of the issues raised in Cadorette. Cadorette addressed whether a condemnation action mooted a further quiet title action. See Cadorette v. United States, 988 F.2d 215, 222-24 (CA1 1993). The above quote from Cadorette was uttered only in that context. Cadorette did not seek to definitively measure the extent of a QTA claim, but only offered the logical observation that such a claim could not lie where a condemnation action had extinguished any possible competing interests in the disputed land. See id. The First Circuit's subsequent decision in Lombard v. United States, 1999 WL 959550 (1st Cir. 1999) is consistent with the Petitioner's interpretation of the Quiet Title Act, in that the First Circuit recognized Quite Title Act jurisdiction over a claim

that the plaintiffs were merely tenants in common with the United States, and that the United States had barred plaintiffs' access to an easement leading to a family cemetery. Indeed, some of the plaintiffs in the Lombard suit claimed as little as a 1/300th interest in the disputed property.

B. The decision of the Court of Appeals for the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

1. The Court of Appeals for the Eleventh Circuit erred when it characterized the government's motion to dismiss as "factual"; according to applicable Eleventh Circuit precedent, the motion was "facial" and should have been denied.

In its decision, the Court of Appeals for the Eleventh Circuit asserted that the government made a "factual" attack on subject matter jurisdiction in this case. **(See App. at p.77)** That assertion is erroneous. The government's motion to dismiss was "facial," not "factual"; it contended only that Dr. McMaster had failed to plead a quiet title action. **(See (App. at p. 91)** The government argued that the Quiet Title Act required that the plaintiff allege some sort of ownership interest contrary to the government's that would allow or result in a rescission to the plaintiff, and that such an interest was lacking here. **(App. at pp.91-92)** However, the government never maintained that, as a factual matter, the court

lacked subject matter jurisdiction.

A "factual" attack considers "matters outside of the pleadings, such as testimony and affidavits . . .." Decision at 7 (quoting Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir.1990) (per curiam)). The government's motion introduced no facts outside of the pleadings.[1] The section in its brief entitled "Factual Background" referred solely to the two deeds that were appended to Dr. McMaster's complaint as Exhibit B and C, respectively. **(App. at pp. 88-90)** The government's legal argument rested entirely upon the facts pled in the complaint. **(App. at pp. 91-92)**

The Court of Appeals for the Eleventh Circuit correctly held that Dr. McMaster's complaint would survive a facial attack. **(App. at pp.76-77)** That determination should therefore have concluded the jurisdictional inquiry, and the panel should have proceeded to address the substantive issues argued on appeal.

2. The Court of Appeals for the Eleventh Circuit erred when it proceeded sua sponte to a factual attack on subject matter jurisdiction.

Instead, the Court of Appeals proceeded to a factual analysis of jurisdiction, in the mistaken belief that the government had made such an attack.[2] In its factual analysis, however, the panel considered arguments and evidence that the government could not have raised even if it had made a factual attack.

The Court of Appeals stated that "Dr. McMaster has never presented any argument to either the district court or this court concerning the United States' alleged interference

with his easement rights." **(App. at pp.77-78)** The Court then reviewed Dr. McMaster's arguments during the summary judgment motions. However, the latter motions were filed six months after the government filed its motion to dismiss, and raised no jurisdictional issues whatsoever. **(See id. p.78)** Thus, the Court of Appeals actually engaged in a factual analysis of subject matter jurisdiction sua sponte.[3]

It was inappropriate, and contrary to precedent, for the Court of Appeals to undertake a factual analysis in the procedural posture of the case. The Government made only a facial attack in its motion to dismiss. The Petitioner responded in kind, arguing, from the pleadings, that he had pled a Quiet Title Act dispute. **(See** District Court's discussion of Petitioner's arguments at **App. at pp. 31, 33-37)** For the Court of Appeals to dismiss for lack of subject matter jurisdiction, on the ground that Dr. McMaster should have offered some form of factual proof of the allegations in his pleadings, penalized him for responding to the facial motion to dismiss with exactly the type of pleading-based analysis required under those circumstances.[4]

The Court of Appeals' sua sponte analysis conflicts with applicable Eleventh Circuit precedent. See Williamson v. Tucker, 645 F.2d 404, 414 (5th Cir. 1981) ("[T]he district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss."). Other circuits have reversed dismissals where the plaintiff was not given an opportunity to be heard or to present evidence on the facts supporting jurisdiction. See id. (citing Harmon v. Superior Court of State of California in and for the County of Los Angeles, 307 F.2d 796 (9th Cir. 1962); Topping v. Fry, 147 F.2d 715 (7th Cir. 1945)). See also Surpitski v. Hughes-Keenan Corp., 362 F.2d 254 (1st Cir. 1966) (per curiam) (overturning dismissal for lack

of personal jurisdiction where plaintiff had not completed discovery and had no chance to present testimony). "Insofar as the defendant's motion to dismiss raises factual issues, the plaintiff should have an opportunity to develop and argue the facts in a manner that is adequate in the context of the disputed issues and evidence." Williamson v. Tucker, 645 F.2d at 414.

The District Court held neither an evidentiary hearing concerning jurisdiction, nor even a hearing based on affidavits. Absent a factual attack, there was no reason why Dr. McMaster should have requested a hearing or offered a factual basis for jurisdiction. It would have been error for the district court to uphold a factual attack on jurisdiction on the basis of such a record. It was equally error for the panel to make such a determination here. See Eaton v. Dorchester Development, Inc., 692 F.2d 727, 732-33 (11th Cir. 1982) (noting that when dismissal would be appropriate following a resolution of disputed factual issues, but the district court had made no such explicit resolution, the appellate court should remand for such determination).

Moreover, in undertaking its factual analysis, the panel relies primarily upon procedural facts arising from the litigation to impugn Dr. McMaster's claim of interference with his easement rights. The panel states that Dr. McMaster "does not suggest that the district court should have made any finding with respect to his easement rights and he does not argue that such an adjudication is necessary or desired." **(App. at p.78)** That statement is contrary to the record. Dr. McMaster styled his motion as a motion for partial summary judgment. The motion only requested a judgment upon Counts II and V of the Complaint. **(See Motion at App., p.101)** The motion preserved for trial four other counts, including Count I, styled the Quiet Title Action.[5]

The primary issue presented for decision in Dr. McMaster's motion was his assertion that the government had "entered into a binding agreement to prohibit camping and campfires in the wildlife refuge, that it is equitably estopped from denying the existence of that agreement, and that it has breached the agreement ...." **(See App. at p. 102)** The remaining issues, including the relationship between the covenants and his easement rights, were left for resolution following a trial.[6]

Not only has the panel ignored precedent in undertaking this analysis, but its reliance upon procedural "facts" was misplaced. If the government had factually shown, for example, that there had been no interference with Dr. McMaster's easements, then a factual attack on jurisdiction might be sustained. However, there has been no such showing. Instead, the panel rests on Dr. McMaster's failure to raise, in his summary judgment motion, jurisdictional issues that he had no incentive to raise after the District Court denied the government's motion to dismiss. This Court should rule that procedural "facts" may not be the basis of a factual attack on jurisdiction, and order a new hearing.

3. Even if the Government had pressed a factual analysis, or if it were appropriate for the Court of Appeals to apply such analysis, a dismissal in this case conflicts with applicable Eleventh Circuit precedent.

In disposing of Dr. McMaster's easement claim, the panel also disregarded important Eleventh Circuit precedent regarding the standard of review applicable to a factual attack. The panel applied a standard that denies the plaintiff the benefit of any presumptions. **(App. at p. 77)** That standard is inapplicable, however, when, as here, the jurisdic-

tional issue is inextricably linked with the merits. See Lawrence v. Dunbar, 919 F.2d 1525, 1530 (11th Cir. 1990). The adverse impact of the government's breach of the agreements on Dr. McMaster's easements is an integral part of the merits of his claim. When a jurisdictional issue is integrally mixed with the merits, the Eleventh Circuit has held that such issues must be evaluated by the same standard of review applicable to a motion to dismiss or a motion for summary judgment.[7] See Lawrence v. Dunbar, 919 F.2d 1525, 1530 (11th Cir. 1990); Chatham Condominium Ass'n v. Century Village, Inc., 597 F.2d 1002, 1012 (5th Cir. 1979) ("We again emphasize that the preferred procedure in cases such as the present one, where the jurisdictional issue is inextricably bound up with the merits, is to defer resolution of the jurisdictional question to a consideration of the merits."); Williamson v. Tucker, 645 F.2d 404, 415 (5th Cir. May 1981)(citing Bell v. Hood, 327 US 678 (1946)). Thus, the Eleventh Circuit clearly erred in applying "factual attack" standards of review in this case.

Respectfully Submitted,

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[7] The government's motion to dismiss was filed before the completion of discovery.

[2] The panel may have replicated a mistake made by the district court in its analysis of the jurisdictional issue. The district court mentioned in passing, without analysis, that the government had made a factual attack on jurisdiction. **(See App. at 33)** The district court may have made this error by picking up on the discussion about the difference between a facial and factual attack contained in the beginning of the government's Reply Brief on the Motion. It is unclear why the government sought to make this distinction, since the body of its reply brief comports with the facial attack contained in its main brief. Nowhere in its initial or reply brief does the government discuss matters outside of the pleadings. **(See App. at pp. 91-92)**

[3] Although the government renewed its argument in its appellate brief that the district court lacked jurisdiction, that argument, too, was a facial attack on jurisdiction.

[4] In keeping with the facial attack on jurisdiction, Dr. McMaster notified the Eleventh Circuit, in his Statement of Jurisdiction contained in his brief, that "the Government has claimed the right to ignore the restrictions against camping, campfires and recreational hunting as well as the right to restrict the beneficiaries' access to the expressly reserved easements."

[5] Count I of the Complaint included ¶ 36, cited by the panel in its determination that a facial challenge to subject matter jurisdiction could not be maintained. **(See App. at p.77)**

[6] Dr. McMaster specifically requested the Eleventh Circuit to grant his motion for partial summary judgment and remand for trial.

[7] The district court followed this analysis. It noted that the government's attack concerned an element of Dr. McMaster's cause of action, thus requiring that the court accept that the plaintiff's allegations are true. **(See App. at 33)**

VII. APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

DR. PHILIP R. B. MCMASTER,

Plaintiff

V.

CV 496-104

UNITED STATES OF AMERICA,
DEPARTMENT OF INTERIOR,
FISH AND WILDLIFE SERVICE,
et. al.,

Defendants.

ORDER

I. INTRODUCTION

Before the Court is the defendants' F.R. Civ.P. 12(b)(1) Motion To Dismiss the Complaint of plaintiff Dr. Philip R. B. McMaster. McMaster has sued the United States, the Department of. Interior's Fish and Wildlife Service ("FWS") and various FWS officials over the FWS's management of a wildlife refuge on Wassaw Island, Georgia. He contends that the FWS is violating his use and easement rights to the refuge because it permits overnight camping and campfires by hunters who control deer overpopulation. McMaster maintains that such practices violate the deed covenants to which the

Government allegedly agreed when the refuge property was donated to it.

Defendants deny plaintiff's allegations and challenge his standing, as well as this Court's subject matter jurisdiction. Opposing the dismissal motion, McMaster asserts that he has standing and has pled an ample jurisdictional basis in his Complaint. Under Rule 12, the Court will accept McMaster's allegations as true. See infra Part III(A).

II. BACKGROUND

The "Wassaw Island Trust" (the "Trust") wholly owned Wassaw Island in 1969, when a third party approached its trustees with an offer to purchase the land for reconveyance to, and management by, the Government. Complaint ¶¶ 15-16. Then a trustee and beneficiary, McMaster involved himself in the ensuing negotiations. ¶¶ Id. 17, 19-20, 22. Through the FWS, the Government agreed to manage the island as a National Wildlife Refuge (the "Refuge"), subject to various express conditions. Complaint ¶¶ 3, 9, 11-12, 15-23.

Those conditions included a ban on "overnight camping or campfires of any sort in the Wildlife Refuge," id. ¶ 20, and the carving out of a "Home Parcel" -- a portion of the island reserved for the exclusive use of beneficiaries like McMaster -- that the Trust would continue to own. Id. ¶¶ 9-10. Consistent with the overall aim of preserving the island in its uninhabited, natural state, Home Parcel users were granted various use and easement rights with respect to the Refuge.Id. 13. Any lapse in the FWS's title would result in reversion to the Nature Conservancy, a non-profit nature organization. Id. 22. In exchange for those conditions, the Trust agreed to sell the island for $1 million -- $6 million

below market value. Id. 20-21.

McMaster has since continued to use the Home Parcel, as well as the roads and trails that pass through the Refuge. Complaint ¶¶ 28 (b) 30 (b) & (c), 54. He insists that any breach of the covenants pertaining to camping, campfire and recreational hunting interferes with his right to use the Home Parcel and Refuge easements benefiting the Home Parcel. Id.

Alleging that the FWS has breached, and will continue to violate, the "no camping/ campfire" covenants, McMaster brought this action under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a. Pursuant to 28 U.S.C. §2201, he seeks a judgment declaring that the covenant violations have occurred and are continuing, thus warranting injunctive relief. Id. at 23-26. In short, he seeks to enforce the covenants.

III. ANALYSIS

A. F.R.CIV.P. 12(b)(1) Standards

Defendants contend that McMaster lacks standing to raise his covenant-based claims. They further argue that such claims do not support a QTA action, upon which 28 U.S.C. § 1346(f) jurisdiction depends, so no subject matter jurisdiction exists. The Court therefore must first determine whether the covenant violations, if proven, place McMaster within the QTA; if so, it would support jurisdiction under § 1346(f). See Mafrige v. U.S., 893 F.Supp. 691, 696 n. 3 (S.D.Tex. 1995); Complaint ¶

That inquiry, however, raises the question of whether defendants' motion presents a facial or factual challenge. See

Garcia v. Copenhaver. Bell & Associates. M.D.'s, 104 F.3d 1256, 1260-61 (11th Cir. 1997). When confronted with a facial challenge, a court need only determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, as his allegations are assumed to be true. Id. at 1261. A factual attack, in contrast, challenges the very existence of subject matter jurisdiction, irrespective of the pleadings. Id. To this end, courts may consider matters outside the pleadings, such as testimony and affidavits. Id.

However, where "the attack on subject matter jurisdiction also implicates an element of the cause of action," id., courts take a different approach. In that context, subject matter jurisdiction and the substantive claim are predicated either in whole or in part on the existence of the same fact. Courts may not find this fact, but instead must assume jurisdiction and proceed to the merits under Rule 12(b)(6) or 56. Id.; Cook Oil Co., Inc. v. U.S., 919 F.Supp. 1556, 1559 (M.D.Ala. 1996). And, the plaintiff's case cannot be dismissed unless it is "clearly immaterial or insubstantial . Garcia, 104 F.3d at 1261 (internal quotes omitted); see also Rhoades v. U.S., 950 F.Supp. 623, 629 (D.Del. 1996).

In that the defendants' factual attack also "implicates an element of McMaster's cause of action" -- i.e., his invocation of the QTA -- the Court will initially accept McMaster's allegations as true for purposes of resolving the dismissal motion, and then proceed, if necessary, to the merits under either Rule 12 (b) (6) or 56.

B. McMaster's QTA Showing

In order to sustain his burden of pleading and proving jurisdiction, McMaster must show that the QTA applies to his case; if so, he can properly invoke 28 U.S.C. §1346(f) as

the jurisdictional basis for his action. §1346(f) "confers subject matter jurisdiction on the federal courts in actions to 'quiet title' in real estate, under [the QTAI, in which the United States claims an interest." Prater v. U.S., 612 F.2d 157, 159 (5th Cir.), clarified on reh'g, 618 F.2d 263 (1980).[1]

In enacting the QTA, Congress waived sovereign immunity "in certain instances for the purpose of determining title to real property." Gardner v. Stager, 103 F.3d 886, 887 (9th Cir. 1996). Congressional waivers of sovereign immunity "must be strictly observed and exceptions thereto are not to be implied." Id. at 887 (internal quotes omitted). Nevertheless, the QTA is not limited to fee interest disputes. 16 Moore's Fed. Prac. 3d §105.27[3] (1997). Rather, its scope is broader than common law quiet title actions. Id. n. 15 (citing Prater, 612 F.2d at 158-59). Indeed, the QTA's legislative history "indicates that Congress meant to permit actions which may not have been properly labeled as actions to quiet title at common law." Prater 612 F.2d at 159; 16 Moore's Fed. Prac. 3d §105.27[3].

Thus, "[a] party need only claim some ownership interest in the property to create a 'disputed title to real property' under the QTA." 16 Moore's Fed. Prac. 3d §105.27[3]. Disputed title under the QTA simply "means disputed ownership." Mafrige 893 F.Supp. at 697. This loose definition may account for why the Government did not challenge the QTA's applicability in either Werner v. U.S. 9 F.3d 1514 (11th Cir. 1993), a case where the plaintiffs claimed an easement by necessity with respect to Government-owned land, id. at 1516 n. 4, or in Patterson v. Buffalo Nat, River, 76 F.3d 221, 223 (8th Cir. 1996) (easement by implication).

In contrast, the Government mounted such a chal-

lenge in Prater. There the plaintiff conveyed her land to the Government, but later sued under the QTA over her alleged oral repurchase agreement with a government official. Prater, 612 F.2d at 158. Prater claimed that the agreement had been breached, so she was entitled to equitable relief in the form of partition and reconveyance of the land. Id.

The Fifth Circuit found jurisdiction under the QTA and §1346(f), id. at 159, since Prater "asserted equitable title to the realty under Georgia trust law, by virtue. of [the government official's] promise of reconveyance." Prater 618 F.2d at 263. "Because Prater claimed a right, title or interest in the property, (the QTA] served as a waiver of sovereign immunity and the district court had subject matter jurisdiction to hear the case under 28 U.S. C. § 1346 (f) (1976)." Id. (emphasis added) .

No QTA coverage exists in the instant case, the Government contends, because McMaster "has not disputed that the United States properly holds *title* [to the Refuge, and he] has [not] sought rescission of the *title* so that it vests in himself individually or in any representative capacity." Doc. # 19 at 7 (emphasis added). This contention rests on the premise that McMaster can advance a QTA claim only by seeking to trump the Government's title to the Refuge with a superior-title claim.

As demonstrated by the discussion above, that premise is flawed. The case law shows that the QTA/ §1346(f) scheme casts a " wide jurisdictional net." U.S. v. Bedford Associates, 657 F.2d 1300, 1316 (2nd Cir. 1981), cert. denied, 456 U.S. 914 (1982) (recognizing jurisdiction over the foreclosure of a mortgage against a government lease interest). Lesser property interests do suffice. Thus, McMaster properly alleges that:

(1) the FWS has violated specified land-management covenants;

(2) the FWS has imperiled his beneficiary-based interest in his use of the Home Parcel and that Parcel's easement rights with respect to the Refuge because

(i) the third party who initially approached the Trust can, under the original 'deed, now seek rescission; and

(ii) that, in turn, would directly threaten Mc Master's Home Parcel rights, Complaint ¶30 (a) , 37;

(3) the FWS's violations adversely impact McMaster's ability to enjoy the use of his Home Parcel property because the unauthorized hunting and campfires have increased the risk of fire or stray bullets, id. ¶ 30(b) & (c) ; see also id. ¶ 31 (a former Refuge manager threatened to arrest any beneficiary who attempted to use Home Parcel easements during FWS-sponsored deer hunting), thereby chilling his use and enjoyment of the Parcel.

Because the range of property interests held to fall within the QTA's "wide jurisdictional net" -- from mineral leaseholds and easements (Mafrige) , to mortgage foreclosures (Bedford) and the breach of an oral repurchase agreement (Prater) -- is expansive, the Court must agree with McMaster that the Government has "claimed an interest in real property" that is "adverse" to that of McMaster's "lesser interest." Bedford, 657 F.2d at 1316. Stated differently, Mc-

Master is litigating property interests which fall within the QTA's scope, thus establishing jurisdiction under 28 U.S.C. 1346(f).

C. Standing

Not only must McMaster establish jurisdiction, but he must show standing as well. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). "When determining standing, a court asks whether [the person bringing the action is] the proper part[y] to bring the suit, thus focusing on the qualitative sufficiency of the injury and whether the complainant has personally suffered the harm." Wilderness Society v. Alcock, 83 F.3d 386, 390 (11th Cir. 1996).

"At an irreducible minimum," McMaster must show that: (i) he has suff ered an "injury in f act, " that is, an invasion of a legally protected interest which is concrete and particularized, and not simply conjectural or hypothetical; (ii) a causal connection exists between the injury and the FWS's conduct, that is, the injury must be "fairly traceable" to the FWS and not the result of some third party's action; and (iii) it is likely the injury will be redressed by a favorable decision. Bennett v. Spear, ____ U.S. ___, ___, 65 U.S.L.W. 4201, 4205 (3/19/97); Lujan, 504 U.S.at 560-61. These
elements are not mere pleading requirements, but rather "an indispensable part" of McMaster's case. Lujan, 504 U.S. at 561; see also Bennett, 65 U.S.L.W. at 4205.

As for the "injury in fact" element, "harm to aesthetic, environmental, or recreational interests is sufficient to confer standing, provided that the party seeking review is among the injured . . . These injuries need not be large, an identifiable trifle will suffice." Save Our Community v.

U.S.E.P.A., 971 F.2d 1155, 1161 (5th Cir. 1992) (cites and quotes omitted). See also Sierra Club v. Martin, 933 F. Supp. 1559, 1569-70 (N.D.Ga. 1996); id. at 1569 n. 2 (discussing the prudential limitations for standing).

Boiled down, McMaster has alleged that the FWS's actions adversely affect his right to use and enjoy his fractional interest in the Home Parcel, including his Home Parcel easement rights with respect to the Refuge. Those harms are directly traceable to the FWS's land-management (i.e., deer-overpopulation) camping policy. McMaster has pled sufficiently specific harm. And, since his claims fall within the QTA's coverage, they likely would be redressed were McMaster to obtain a favorable decision. Martin, 933 F.Supp. at 1569-70.

In sum, McMaster has standing to sue under the QTA and obtain injunctive relief to enforce the Government's promises. The fact that title to the property can revert to the Nature Conservancy, rather than directly to McMaster, is immaterial; the Government does not deny that, upon such reversion, his interest would be adversely affected.

IV. CONCLUSION

Accordingly, defendants' Motion To Dismiss (doc. # 18) is DENIED.

SO ORDERED, this 4th of April, 1997.

AVANT EDENFIELD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

DR. PHILIP R. B. MCMASTER

Plaintiff,

V.

CV 496-104

UNITED STATES OF AMERICA,
DEPARTMENT OF INTERIOR,
FISH AND WILDLIFE SERVICE,
et. al.,

Defendants.

ORDER

I. INTRODUCTION

Plaintiff Dr. Philip R. B. McMaster has brought this declaratory judgment action against the United states, the Department of Interior's Fish and Wildlife Service ("FWS") and various FWS officials over the FWS's management of a wildlife refuge on Wassaw Island, Georgia. He objects to overnight camping by hunters sanctioned by the FWS to control island deer overpopulation. That activity, he contends, violates restrictive covenants to which the FWS allegedly agreed when it acquired the property. Thus, McMaster wants the Court to enforce those covenants.

Defendants deny plaintiff's allegations. Both sides have

now moved for F.R.Civ.P. 56 summary judgment, leading the Court to apply the principles detailed in Mize v. Jefferson City Bd.of Educ., 93 F 3d 739, 742-43 (11th Cir. 1996) and Cohen v. United American Bank of Cent, Fla, 83 F.3d 1347, 1349 (11th Cir. 1996).

In that regard, defendants have failed to materially dispute portions of plaintiff is Statement of Undisputed Material Facts ("Facts"). In contrast to F.R.Civ.P. 36(a) responses, it is not sufficient to simply "deny" or "disagree with" such Facts. See Defendants' 4/18/97 "Opposition Brief" (doc. # 34) at 1-2. Rather, a party can *only show* a triable issue of fact by countering each Rule 56 (Local Rule 56.1) Fact Statement with a citation to rebutting evidence, either in the form of a record reference or.an affirmative statement that the fact asserted is unsupported. See, e.g., Union Planters Nat. Leasing, Inc. v. Woods, 687 F.2d 117, 119 (5th Cir. 1982) ("Defense of a proper summary judgment motion requires more than a mere denial. The party opposed to the motion is required to bring forward significant probative evidence demonstrating the existence of a triable issue of fact") (cites and quotes omitted); 10A Wright, Miller & Kane, Fed. Prac. & Proc.: Civil 2d § 2727..

Similarly, many of plaintiff's Fact Statements fail to cite to the record for support. See doc. # 29. While this omission is somewhat mitigated by the parties' stipulations in their proposed Pretrial order, it still burdens this Court unnecessarily. After all, "[j]udges are not like pigs, hunting for truffles buried in [the record]. U.S. v. Dunkel, 927 F.2d *955, 956* (7th Cir. 1991). The following background facts, then, have been assembled against this backdrop.

II.

A. The Island

George Parsons acquired Wassaw Island, Georgia, in 1866. Facts (doc. # 29) ¶ 1. Hies descendants formed the "Wassaw Island Trust" (the "Trust") to preserve the island in its natural state. Doc. # 36 (brief) at 3. McMaster is a Parsons descendant, trust beneficiary, and former trustee. Id.; McMaster Aff. (doc. # 36 Exh. A) ¶¶ 2 & 5; McMaster Dep. at 10, 31.

By 1969, the Trustees feared that the State might condemn the island and open it to public use or development. McMaster Aff. ¶ 3 . Indeed, plaintiff's parents expressed their concern to an acquaintance, Mrs. Margaret Parmly. She subsequently offered to donate $1 million to facilitate a conveyance of the island for preservational purposes, first to the Nature Conservancy (a nonprofit organization), and then to the federal government. Doc. # 36 (brief) at 3; McMaster Aff. 5; McMaster Dep. at 11; Facts ¶ 10. Parmly expressly conditioned her offer upon the Government's agreement to prohibit camping and fires on the donated land. McMaster Aff. ¶ 5.

B. The Agreement

Armed with this offer, McMaster, then a trustee, negotiated with the Government on behalf of the Trust. McMaster Dep. at 11-13; Gottschalk Dep. at 10-11, 13. He met with John S. Gottschalk, the director of what today in the FWS. Gottschalk Dep. at 7-8, 9; see also Facts ¶ 6. Gottschalk had the authority to enter into property agreements with private parties on the Government's behalf. Gottschalk Dep. at 9-10; Facts ¶ 7; doc. # 40 at 2, Stipulation # 6.

Gottschalk recalls McMaster's expressed interest in conditioning the donation upon an array of restrictions aimed at preserving the island in its natural state. Gottschalk Dep. at 13-23. Much discussion revolved around "the idea of allowing public camping on the refuge," Gottschalk Dep. at 14, and that "there would be no overnight camping." Id. at 15. They also addressed the Trust's concern that open campfires might lead to accidental wildfires. Id. at 16.

Initial correspondence between the Government, McMaster and his backers proposed broad discretion for the FWS. See Gottschalk Dep. Exh. 1 at 2 (allowing the FWS to permit "public hunting, fishing and compatible recreational use"). Mrs. Parmly, however, objected. Id, Exh. 2 ("One thing that should be prohibited is camping; for camping brings fires...."); McMaster Dep. at 19. The FWS responded that, while it normally relied on public hunting for wildlife population control it nevertheless agreed "that camping will be prohibited." Gottschalk Dep. at 22 & Exh. 3; id. at 23 ("I wanted to make it very clear and make sure the (Parsons) family understood that we agreed to that. We felt that the ... value of the island was great enough that we could restrict public use to the extent indicated") id. at 26, 27; McMaster Dep. at 19.

To accommodate hunters, nearby Pine Island would be used as campgrounds. McMaster Dep. at 15; Gottschalk Dep. at 27 Exh. 5. In addition, the parties carved out a "Home Parcel" -- a portion of the island reserved for the exclusive use of beneficiaries like McMaster -- that the Trust would continue to own. Facts ¶ 12; Complaint ¶¶ 9-10. Consistent with the overall aim of preserving the island in its natural state, Home Parcel users, including McMaster, were granted various use and easement rights with respect to the

Refuge. Facts ¶¶ 13, 15; Complaint ¶ 13; doc. # 34 at 3 ("Response to Item No. 15"); doc. # 40 at 3, Stipulation # 14.

The Trust accepted those conditions, but the parties failed to memorialize them in a formal contract signed prior to delivery of the deed. Doc. # 34 at 9; doc. # 36 (brief) at 11. Accordingly, in 1969 the Trust sold the island (with the exception of the "Home Parcel") to the Nature Conservancy for $1 million. Facts ¶ 12; McMaster Aff. ¶ 11. For $1.00 and the FWS's consent to certain easements and restrictive covenants, the Conservancy then conveyed the land now known as the "Wassaw National Wildlife Refuge" (the "Refuge") to the Government. Facts ¶ 12; McMaster Aff. ¶ 12. Fact ¶ 12; doc. # 34 at 2 ("Response to Item No. 12"); doc. # 30 Exhs. 1-2. Gottschalk left the FWS in 1970. Gottschalk Dep. at 38.

C. The Deeds

The Conservancy FWS deed conveyed the island to the FWS "for the purpose of creating a fish and wildlife refuge to be maintained as nearly as practicable in its natural state." Doc # 30 Exh. 2 at 3. Notwithstanding any promises made prior to closing, the deed specifies only three land-use prohibitions. The first two relate to the commercial use of the premises and road or bridge construction. The third reads as follows:

> 3. Use of the Granted Premises for hunting or lumbering. *"Hunting" shall not be, deemed to include hunting supervised by any governmental agency for the purpose of reducing an overabundance of any species of mammal*, and "lumbering" shall not be deemed to include removal of trees for the purpose of improving the ecological environment.

Id. at 3-4 (emphasis added). These restrictions paralleled the Trust-Conservancy deed. See Doc. # 30 Exh. 1 at 3-4.

D. "Backpedaling"

By 1975, Trust beneficiaries, including McMaster began to complain to the FWS about camping on Wassaw island. McMaster Dep. at 23-24. That April, McMaster wrote FWS officials and reminded them of the FWS's "no camping" promise. McMaster Aff. ¶ 15 & Exhs. F & G.[1] In 1986, he obtained from Gottschalk a written affirmation of what Gottschalk understood to be the FWS's agreement. Id. at 25; Gottschalk Dep. Exh. 4 ("We agreed ... that there should be no recreational development including camp sites, and that public camping would not be permitted"). However, when questioned in 1997 about the 1986 correspondence, Gottschalk acknowledged that the parties had failed to expressly set forth the no-camping limitation in either the Trust/Conservancy or Conservancy/FWS deed. Gottschalk Dep. at 35-37; Doc. # 30 Exhs. 1-2.[2]

McMaster's own 1975 letters to FWS officials reflect his agreement on that point:

> In order to convince the donors to yield their ownership, certain agreements had to be made. Because the federal government did not wish to set a precedent by putting all these in a deed, some vital agreements concerning these matters were made but ***not*** placed in the deed. These agreements were made between me -- as a representative of the owners and trustees -- and the Department of the Interior represented by Dr. Gottschalk.

* * * *

These restrictions included a prohibition saying no public person could spend the night upon the transferred property and that camping would be prohibited. The intent of this is clear from the attached letter.

Another restriction prohibited any member of the public from starting fires for cooking, etc. Reference to this is clear f ram one of the letters f ram the Interior Department.

Doc. # 36 Exh. 1 (McMaster Aff. Exhs. F at 1-2 & G at 1-2) (emphasis added).

By 1994, the FWS actively facilitated overnight camping, but limited it to hunters. Facts ¶ 14; doc. # 34 at 2 ("Response to Item No. 14"); doc. # 36 Exh. 21 (12/3/93 FWS letter to Trustee announcing intent to permit "hunter camping," but not "recreational camping"); doc. # 40, Stipulation # 13. That same year, the Trustees voted to allow camping on Wassaw island, Gottschalk Dep. at 38-39; McMaster Dep. at 28, although McMaster believes the FWS intimidated them into doing so. McMaster Dep. at 29-31; doc. # 36 (brief) at 9.

III. ANALYSIS

A. "There Are Promises, And Then There Are Promises"

The Statute of Frauds,[3] parol evidence rule[4] and deed-requisites statutes comprise a "safe-contracting" prophylactic against the sort of dispute raised by this litigation. Exceptions to these rules have grown over time, and McMas-

ter seeks to exploit some of them here.

To begin, the Court must analyze the deed itself. While a deed conveys real estate, it also serves as a contract. See Taylor v. Smith, 221 Ga. 55, 56 (1965) ("deeds like other contracts should be construed so as to give full effect to the intention of the parties. . . ."). Hence, both the Statute of Frauds and the parol evidence rule, along with their respective exceptions, come into play.

O.C.G.A. § 13-2-2 (1) authorizes courts to consider parol evidence where "it is manifest that the writing was not intended to speak the whole contract...." Id. Similarly, O.C.G.A. § 24-6-1 permits the consideration of parol evidence where there exists "a separate and distinct, collateral oral agreement that is consistent with and forms part of the consideration or inducement for a written agreement." Talmadge v. Respess, 482 S.E.2d 709, 711 (Ga. App. 1997) (cites and quotes omitted) This exception does not apply, however, where "the parties expressly agreed to preclude enforcement of any prior inducement not included in the written contract." Id.

Still, even where § 24-6-1's "collateral agreement" exception nominally applies, covenants must be part of the recorded conveyance in order to run with the land. See Moore v. Dixon, 264 Ga. 797, 798 (1994); Southeast Toyota v. Fellton, 212 Ga. App. 23, 25 (1994); see also U.S. v. 0.08246 Acres of Land, 888 F. Supp. 693, 710 n. 22 (E.D.Pa. 1995) (to be enforceable, a covenant running with the land must be accompanied by a transfer of interest) (Pennsylvania law); cf. In re Jenkins, 74 B.R. 440, 446 (Bkrtcy.N.D.Ga. 1987) ("A covenant running with the land may exist in favor of the grantee although it attaches to land that is not the subject of the conveyance") (Georgia law). If

the covenants are not made part of the recorded conveyance, they simply form a "personal contract," not binding on successors in interest. Moore, 264 Ga. at 798.

Parol evidence may also be considered where the parties dispute whether the consideration supporting a contract or conveyance has failed. This typically occurs where the deed contract recites merely a "form consideration" (e.g., "for $10 and other valuable consideration"), instead of specifying the actual consideration. In such cases, courts admit parol evidence to show the actual consideration supporting a contract is different from that recited in the instrument itself. McCann v. Glynn Lumber Co., 199 Ga. 669, 678-79 (1945).

Conversely where the consideration is not ambiguous, parol evidence cannot be considered to show the parties' intent. Id. Either way, such evidence cannot vary or contradict the substance and meaning of the written terms of the contract or deed itself. Zorn v. Robertson, 237 Ga. 395, 397 (1976) ("one of the parties to a deed can not, under the guise of inquiring into its consideration, alter the term of the instrument . . .") Nor can a party use the exception to show the existence of an entirely different contract than that evidenced by the writing in question. Branan v. Warfield & Lee, 3 Ga. App. 586, 587 (1908).

Also relevant is the Statute of Frauds' "part performance" exception. Under O.C.G.A. §13-5-31(3), for example, one party's partial performance can sometimes make an oral agreement enforceable. See White v. Orton Industries. Inc., 224 Ga. App. 342, 343 (1997); Cardin v. Outdoor East;. A. Limited Partnership, 481 S.E.2d 872, 873 (Ga. App. 1997).

These general contracting and conveyancing rules

are, in turn, subject to specific subsidiary principles governing the construction and interpretation of real property deeds:

> The whole deed or instrument must be looked to, and not merely disjointed parts of it. T he recitals in the deed, the contract, the subject-matter, the object, purposes, and nature of the restrictions or limitations; if any, or the absence of such, and the attendant facts and circumstances of the parties at the time of the making of the conveyances are all to be considered.

Stafford v. DOT 267 Ga. 531, 532 (1997) (cites and quotes omitted).

Hence, courts have considered parol evidence to resolve deed description ambiguities, 23 Am. Jur. Deeds 2d § 315, explain abbreviations, id. § 319, or explain the conveyance of fractional interests (e.g., "the south half of a certain section"). Id. § 318. But, as the Stafford court warned, "[r]estrictions on the use of real property will not be expanded by construction, and any uncertainty will be settled in the grantee's favor." Id., 267 Ga. at 532. Restrictive covenants are subject to construction rules similar to those applicable to deeds, though courts tend "to discourage restrictions on the free alienation of property . . . ." Leavell v. State Highway Dept., 121 Ga. App. 112, 113 (1970) (internal quotes and emphasis omitted). "No precise or technical words are necessary to create a covenant but language which will evidence the intention of the parties that a covenant be created is sufficient and if the covenant is plainly expressed thereby and no ambiguity exists, the rule of strict construction does not apply." Taylor, 221 Ga. at 56.

Finally, of paramount importance here is the merger doctrine well. In many real estate transactions, the parties actually enter into two different contracts. The first covers their mutual promise to buy/sell land for a specified price. When they "close" (i.e., when A gives B money or other consideration for B's title), the first contract "merges" or collapses into the second, the deed itself. To ensure that the first contract 's promises survive merger, the first contract. must express that intent. Alternatively, many promises, also called covenants, can be set forth in the deed itself. Either way, the parties must specify which promises are to survive the closing.

The merger doctrine sometimes produces harsh results especially for parties ignorant of its existence. For example, assume that A closes on an unfinished custom home and lot with B, who promised, prior to closing, to finish building the home. After closing, B, having received the full purchase price, fails to complete the home, claiming that his promise to that effect "merged" at closing. Due to such unfairness, courts have developed "performance" exceptions aimed at enforcing what the parties "really" intended. See Grant v. Aulicky, 161 Ga. App. 817, 817-18 (1982) (agreements which are unrelated to title or possession, and that are "so far collateral thereto as to indicate that their omissions from the deed was without any deliberate intent to preclude their survival of that instrument ... will be held to survive the deed") (cites and quotes omitted).

To this end, the Georgia Supreme Court in Holmes v. Worthey, 249 Ga. 104 (1982), held that the "build" provisions of a build-sale contract would survive merger. Id. at 105; Seely v. Lloyd H. Johnson Constr. Co., 220 Ga. App. 719, 720 (1996). See also Gaudet v. Starr, 215 Ga. 451, 452 (1994) (where a seller promised, at the closing table, to make

repairs to a residence for damage caused by a previous termite infestation, no merger occurred). Even vendee promises sometimes survive merger, notwithstanding the absence of a survivability clause. See Binion v. Ivestor, 185 Ga. App. 759 (1988) (home purchasers were bound by an unmerged oral agreement to return or purchase seller's personalty).

In contrast, the court in P.B.R. Enterprises Inc. v. Perren, 243 Ga. 280 (1979), held that the merger doctrine applied to a builder's oral promises (e.g., to repair a home's defects within one year of the sale) omitted from the deed. Id. at 2 8 2. In Zarett v. Wasserman, 180 Ga. App. 565 (1986), the Georgia Court of Appeals reached the same result with respect to a developer's promise to furnish written warranties at closing. Id. at 566-67 ("While collateral agreements relating to future performance of work by the grantor with respect to the property are not extinguished by acceptance of the deed, an agreement relating solely to the papers and documents to be executed and delivered at closing clearly is still subject to the merger rule"); see also Anziano v. Appalachee Enterprises Inc., 208 Ga. App. 760, 761 (1993) ("the doctrine of merger renders any claim on a sales contract for unimproved realty a nullity after [the buyers] accepted the warranty deed"). See generally 44 Am. Jur. 2d *Vendor And Purchaser* § 290.

To be sure, these distinctions are not always crisp, and perhaps even debatable upon serious scrutiny. But two points are clear. First, the above-cited unmerged promise cases all involved the performance of covenants or promises within a relatively short amount of time. None of the covenants implicated the vendee's ability to sell or freely use the land itself so as to offend Georgia's free-alienability principles. See e.g., O.C.G.A. § 44-5-60 (restricting many

covenants to 20 years). Second, none of the unmerged promises related to title or possession. See Grant, 161 Ga. App. at 817.

It is in this light that the Court turns to Jenkins, which addressed whether a contract-based restrictive covenant merged into a subsequent deed. Applying Georgia law, the court reasoned that

> [w]hen parties have contracted to convey land, [the merger] doctrine provides that all agreements, unless distinctly collateral, and terms contained in an antecedent sales contract are merged into and superseded, by the subsequently delivered deed. Provisions that impose obligations on a vendor *not relating Co title or possession* are excepted f rom this rule. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties.

Id., 74 B.R. at 446 (quotes and cites omitted; emphasis added). Noting that the "merger rule has been applied to void easements in land as well as other promises contained in a prior contract," id., the court held that, because a restrictive covenant contained in an unrecorded contract that contained no survival clause was riot included in a subsequent warranty deed, it merged. Id. at 446-47.

Thus, Jenkins shows that collateral agreements imposing "obligations [e.g., a builder's promise to complete construction of a home] on a vendor *not relating to title or possession* are excepted from" the merger doctrine. Id.at 446 (emphasis added). In contrast, restrictive covenants, which ***do*** relate to title or possession, are not excepted. Indeed, in Fields v. Davies, 235 Ga. 87 (1975), the court held that a

contract to convey half of an adjoining lot related to title or possession. Id. at 88-89. As a consequence, it merged into a deed that the purchasers should have read before accepting. Id. see also Jordan v. Flynt, 240 Ga. 359, 362-63 (1977). In contrast, the unmerged "build" and "termite-damage repair" promises in the Holmes/Gaudet line of cases did not bear on title and possession. Thus, they were "collateral" to the closing itself.

B. Construing The Wassaw Island Deed

In this case, the FWS contractually promised to enter into a restrictive covenant banning camping on the uninhabited, unimproved portion of Wassaw Island. However, any evidence that the parties intended that promise to survive merger is directly negated by the parties, failure to (1) insert the no-camping promise in the deed itself or at least (2) formalize its survivability in writing. All McMaster has shown is pre-deed written and oral assurances that easily could have been, but were not, reduced to a survival clause at the very least. The parties well knew what to say but chose not to say it. Whatever the reason (e.g., out of fear of "setting a precedent"), the omission of the "no-camping" promise from the deed, or a separate agreement bearing a survival clause, spells doom for McMaster's case.

The "no-camping" promise ***did*** relate to "title or possession" -- namely, the manner in which the FWS would exercise its possessory rights on the island. It does not, therefore, compare to the "builder's performance" exception carved out of the merger rule by Holmes. Because the "no camping" promise is not sufficiently collateral, the parties extinguished it at the closing table.

To that end, much argument has been raised over

whether McMaster can, for example, inquire into the validity of the consideration, or whether the "separate agreement" survives the Statute of Frauds writing requirement under the part-performance exception to that rule. Yet, the Court need reach these contentions because (1) McMaster insists that he relies solely on the "collateral" agreement ("Holmes"-type) exception to the merger rule;[5] and (2) those arguments go to whether a collateral agreement even exists.

Even if McMaster could surmount the parol evidence and Statute of Frauds hurdles to prove the existence of a collateral agreement, he has nevertheless failed to show that it would survive merger. In 1969, the law informed the parties how they could spare a covenant from the merger doctrine. There is no indication that anything prevented McMaster and the Trustees from reading the deed, see Fields 235 Ga. at 88-89; Isaacson v. Carbo, 176 Ga. App. 514, 515 (1985), or from informing themselves of the merger doctrines legal effect when they closed on this transaction.

Nor does plaintiff show any valid estoppel-based or constructive-trust grounds that trump the merger doctrine. For the same reasons, Gottschalk's belief (both in 1969 and 1997) that the FWS would have little problem honoring the no-camping promise simply does not justify judicial revision of the deed's otherwise clear terms. Beliefs and expectations are one thing, but reducing a promise to a merger-proof writing is quite another. Sophisticated parties sat down at the closing table in 1969. Dissatisfaction over the deed's covenants should have been resolved then, not 28 years later through litigation.

IV. CONCLUSION

Accordingly, the defendants' Motion For Summary

Judgment (doc. # 30) is GRANTED. Plaintiff McMaster's Motion for Partial Summary Judgment (doc. #27) is DENIED, and his Complaint is DISMISSED WITH PREJUDICE. Given the above reasoning, the Court does not reach defendants' remaining arguments.

SO ORDERED this 23rd day of May, 1997.

B. AVANT EDENFIELD, JUDGE
UNITED STATES DISTRICT
SOUTHERN DISTRICT OF GEORGIA

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[1] The record is unclear as to whether camping actually commenced at that time.

[2] On further questioning about the deed omission, Gottschalk admitted that he could not be sure, decades later, precisely what he meant as to the strength of the FWS's "no-camping" promise. Gottschalk Dep. At 41. At the same time, however, he also conceded that when the FWS made its "no-camping" promise in 1969, "none of us imagined" any problems like those now plaguing the FWS. See, e.g., Gottschalk Dep. At 35; id. At 34 (tidal inundation of Pine Island; "potential tort liability to the agency by having campers go from Pine Island to Wassaw Island"); see also id. At 37 (he has never seen the islands).

[3] See O.C.G.A. § 13-5-30(4) ("[a]ny contract for sale of lands, or any interest in, or concerning lands" must be in writing").

[4] See O.C.G.A. § 13-2-2(1) ("Parol evidence is inadmissible to take from, or vary a written contract"); O.C.G.A. § 24-6-1 ("[p]arol contemporaneous evidence is generally inadmissible to contradict or vary the terms of a valid written instrument").

[5] "Dr. McMaster has never contended that the agreement to prohibit camping and fires is a part of the deed; but rather, that it was a separate enforceable agreement regarding acts which the [FWS] would not perform after the conveyance of the deed." Doc. 36 (brief) at 11.

UNITED STATES DISTRICT OF GEORGIA
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

DR. PHILIP R. B. MCMASTER,

Plaintiff,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF INTERIOR FISH AND WILDLIFE SERVICE, et. al.,

CV 496-104

Defendants.

ORDER

I. BACKGROUND

In this Quiet Title Act case the Court recently granted summary judgment to the defendants (collectively referenced as the Fish and Wildlife Service, or "FWS") against plaintiff Philip R. B. McMaster. Doc. #43. McMaster challenged FWS deer-management practices on Wassaw Island, which had been deeded to the FWS in 1969 for preservational purposes. Doc. # 32 at 10. According to McMaster, the FWS has been violating a "no overnight camping/campfires" covenant by permitting overnight camping by recreational hunters used to

control deer overpopulation. In granting the FWS summary judgment, the Court denied plaintiff the injunction he sought to stop the camping.

In reaching that result the Court essentially construed the parties' summary judgment briefs as turning on a single issue: whether the "no-camping" covenant – asserted by plaintiff as collateral to the deed – had merged into the deed at closing. See doc. #27 at 2; # 28 at 2, 7-10; # 30 at 9; #34 at 3-14; #36 at 1-14; #37 ¶ 8. The Court concluded that it did, rendering moot McMaster's subsidiary arguments (e.g., parol evidence, Statute of Frauds, estoppel, etc.) going to the existence and enforceability of the covenant itself.

Now moving for reconsideration, McMaster not only challenges those rulings, but insists that the Court at most should have granted partial summary judgment to the FWS because there remains one recovery theory that the Court "overlooked": his entitlement to injunctive relief based solely on an express deed provision (as opposed to the collateral agreement) restricting hunting on the island. Doc. # 46 at 4.[1] In other words, even though the Court has ruled that the collateral ("no camping") agreement is unenforceable because it merged into the deed, McMaster now contends that the deed provision itself supplies the basis for injunctive relief. Doc. # 46 at 5.

II. ANALYSIS

A. The "Restricted Hunting" Deed Provision

The deed provision upon which plaintiff relies prohibits:

> Use of the Granted Premises for hunting or lumbering. "Hunting" shall not be deemed to include hunting supervised by any governmental agency for the purpose of reducing an ***overabundance*** of any species of mammal, and "lumbering" shall not be deemed to include removal of trees for the purpose of improving the ecological environment.

Doc. # 43 at 6; doc. # 30 Exh. 2 at 3-4 (emphasis added).

McMaster agrees that this covenant does not apply to hunting meant to address deer "overabundance." However, he disagrees that there is an overabundance; indeed, he accuses the FWS of causing a population increase. See doc. # 46 at 4-5 (citing documentary evidence in doc. # 36). Plaintiff bolsters his argument by pointing to another deed provision which requires that the island be maintained "as nearly as practicable in its natural state."

The FWS denies plaintiff's assertions and insists that there is no genuine issue of fact on the overabundance issue. It contends that the "deed to the federal government does not require that the FWS operate the deer hunts in a manner that [plaintiff], or anyone else for that matter, believes is the least costly." Doc. # 49 at 6. In effect the FWS maintains that, if McMaster (and the trustees) wanted a deed clause authorizing him to litigate every time he disputes the existence of a deer "overabundance," then he should have obtained it at the closing table in 1969.

As an initial matter, the Court notes that McMaster's latest argument ties into the "no-camping" argument he previously raise, since it is the FWS's contention that, without overnight camping, it cannot attract enough hunters to efficiently thin the herd. Indeed, McMaster initially focused his

case not so much on hunting, but on the manner by which the FWS facilitates it (i.e., by permitting overnight camping and concomitant campfires, etc., rather the use of professional-hunter option McMaster promotes to this day, see doc. # 48 at 4).

Moreover, the Court agrees with the FWS that plaintiff's latest analytical construct essentially would grant him standing to sue for injunctive relief every time he disagreed with an FWS overabundance determination. Yet, the deed itself contains no definition of "overabundance" or guidance for clarifying the word, thus creating a wide avenue for interpretation.

Hence, the rock bottom issue is whether the deed's "hunting" provision is enforceable. Under Georgia deed law, the Court begins by assessing the parties' intent, which "may be ascertained from the language of the deed as a whole and the surrounding facts. . . ." Parker v. Adamson, 109 Ga. App. 172, 174 (1964). Where it "is plain and contravenes no rule of law, it should be given effect regardless of mere literal repugnancies in different clauses of the conveyance." Id.

Nonetheless, "[r]estrictions on the use of real property will not be expanded by construction, and any uncertainty will be settled in the ***grantee's*** favor." Stafford v. DOT, 267 Ga. 531, 532 (1997) (emphasis added); Leavell v. State Highway Dept., 121 Ga. App. 112, 113 (1970); see also Hart v. U.S., 945 F.Supp. 1009, 1011 (E.D.Tex. 1996) (Texas law). Furthermore,

> [w]hile all clauses and words in a deed will be considered in construing it, the Courts are not concerned with what the parties ***meant*** to

> say, but the meaning of what they ***did*** say. The court cannot act on surmise as to intention, or even effectuate a manifest intention where the grantor has omitted to use words required to give effect to such intention; it must construe the instrument ***as it is written***. The court can neither put words into a deed which are not there nor put a construction on words directly contrary to their obvious meaning.

23 Am Jur Deeds 2d § 225 (emphasis added; footnotes omitted).

The "hunting" provision draws its meaning from the surrounding deed provisions, which include the following granting and habendum clauses:

> Grantor has granted, bargained, sold, aliened, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, convey and confirm unto the said Grantee, its successors and assigns, the following described parcels of land, to wit: . . .
>
> * * * *
>
> TO HAVE AND TO HOLD said parcel of land with all and singular the rights, members and appurtenances thereof to the same being, belonging or in anywise appertaining to the only proper use, benefit and behoof of the said Grantee, its successors and assigns, forever . . . .

Doc. # 30 Exh. 2 at 1, 3. These provisions convey Wassaw

Island, excepting a portion identified as the "Home Parcel" for private use. They are followed by general purpose, forfeiture and restriction clauses:

> The Granted Premises are conveyed to the Grantee for the purpose of creating a fish and wildlife refuge ***to be maintained as nearly as practicable in its natural state***.
>
> The title of the Grantee shall cease and determine upon the happening of any one of the following events:
>
> 1. The use of the Granted Premises for any industrial or commercial purpose . . .
>
> 2. The construction of a roadway or bridge to the Granted premises. . . ; or
>
> 3. Use of the Granted Premises for hunting or lumbering. "Hunting" shall not be deemed to include hunting supervised by any governmental agency for the purpose of reducing an ***overabundance*** of any species of mammal, and "lumbering" shall not be deemed to include removal of trees for the purpose or improving the ecological environment.

Id. at 3-4 (emphasis added).

This section of the deed concludes with a restatement of the forfeiture provision, coupled with a reverter clause:

> Upon the happening of any of the foregoing events, the title of the Grantee shall cease and determine and the title shall revert in fee simple, (subject, however, to the easements and restrictions of the Home Parcel) to the Grantor.

Id. at 4.

On their face these provisions state that if the "hunting" provision is violated, the estate can be forfeited to the grantor. Of course, the provisions cannot be read so simplistically, but instead must be threaded through Georgia property law. To that end, Georgia law abhors forfeiture, and encourages courts of equity to convert forfeiture claims to damages. See O.C.G.A. § 23-1-23 ("Where the rules of construction will allow, equity seeks always to construe conditions subsequent into covenants and to relieve against forfeiture"); O.C.G.A. § 44-6-41 ("The law favors conditions to be subsequent rather than precedent and to remediable by damages rather than by forfeiture"); First Rebecca Church, Inc. v. Atlantic Cotton Mills, 263 Ga. 688, 689 (1993). McMaster seeks neither damages nor forfeiture – only equitable (injunctive) relief to enforce the "hunting" provision (i.e., to enjoin the FWS-authorized hunting). Doc. # 1 at 23-26.

However, the "hunting" provision cannot be read alone; it works in unison with the forfeiture/reverter ("forfeiture") provision, which itself can be deemed invalid if found repugnant to the estate granted. In other words, each section of the deed must not only independently survive scrutiny, but also remain viable when read in conjunction with each other.

For example, suppose the holder of a reversionary

interest (i.e., the party to whom the estate, upon forfeiture, will revert) in a fee simple defeasible estate claims that the grantee violated a forfeiture-activating deed provision. Where that activating provision is so broad that it amounts to an undue forfeiture threat, it may be deemed unenforceable as constituting an impermissible interference with the grantee's right to fully enjoy that estate that has been granted to him.

Such provisions are void as repugnant to the estate granted. See, e.g., Wills v. Pierce, 208 Ga. 417, 418 (1951) ("A provision in a deed or will that a fee-simple estate may not be sold is void as being repugnant to the estate granted"), cited in First Rebecca Church, 263 Ga. at 689 (reverter clause which worked a forfeiture upon the non-permitted use of land "is generally invalid as an impermissible restraint on alienation"). See also Floyd v. Hoover, 141 Ga. App. 588 (1977); cf. Wisse v. Anderson, 235 Ga. 255, 257 (1975) ("An express devise of lands cannot be reduced to a lesser estate by subsequent language of doubtful meaning"). Because of the legal cloud that these provisions form over the estate, the holder of the reversionary interest cannot avoid invalidity merely by requesting (e.g., injunctive relief) something less that forfeiture.

Applying that analytical construct here, the Court finds that the "hunting" provision used to activate the forfeiture provision is unenforceable. To begin, the deed's granting clause dose not clearly purport to convey an unrestricted "fee simple" estate. In that it is somewhat ambiguous, the Court must read it in conjunction with the deed's other clauses "defining, explaining, or qualifying the estate intended. . . ." 23 AmJur2d Deeds § 284. For the sake of McMaster's argument, the Court will conclude that, at a minimum, the grantor conveyed "an estate upon condition subse-

quent, upon the breach of which the land would revert to the grantor." Williams v. Thomas County, 208 Ga. 103, 105-06 (1951); see also Rustin v. Butler, 195 Ga. 389, 390-92 (1943). Alternatively, the deed conveyed a "fee simple defeasible, which is an estate in fee simple subject to a condition subsequent." Floyd, 141 Ga. App. at 591.

In addition, the Court will further assume that, standing alone, the forfeiture clause is valid. To that extent, McMaster has shown a defeasible estate that can be forfeited and thus, one presumes (although it is not necessary to reach the issue here), protectible via the equitable relief he now seeks. However, even with all of those assumptions in McMaster's favor, repugnancy nevertheless sets in when the "hunting" provision activates the forfeiture clause.

Indeed, McMaster's own construction of the "hunting" provision accords virtually unlimited powers to the reversionary interest. He can sue just about anytime he disagrees with the FWS over the measure of deer "overabundance." Construing the "hunting" provision in favor of the grantee (the FWS), Stafford, 267 Ga. at 532, the Court must find that, to the extent it is enforced through the condition subsequent (i.e., the forfeiture clause), it is unenforceable as repugnant to the estate conveyed, as well as the free use and habitability rights Georgia law otherwise demands.

Alternative grounds support this result. The "hunting" clause – even when viewed apart from its corresponding deed clauses – also is unenforceable because it is left undefined and thus unsalvageably ambiguous. Indeed, even were parol evidence admissible under relevant deed-construction rules, see 23 AmJur2d Deeds §§ 82, 314-15, McMaster has referred the Court to no competent evidence

showing what the parties mutually intended "overabundance" to mean. In fact, her proffers only this: "the deed states that hunts must be conducted so as to maintain the granted premises 'as nearly as practicable in its natural state.'" Doc. # 48 at 4 (quoting the deed). That reading, however, provides about as much guidance as the "do good, avoid evil" law-clerk oath noted in Bishop v. Albertson's Inc., 806 F.Supp. 897, 901 n. 4 (E.D.Wash. 1992). Hence, the "nearly as practicable" deed clause does not cure the "hunting" clause's fatal defect.

The case law also weighs against the plaintiff. See Hitt v. Lord, 194 Ga. App. 655, 656 (1990) (real estate contract "subject to rezoning," but silent as to what property was to be rezoned, found too vague and indefinite to be enforced); Hollyhock Farms Inc. v. Schoenlaub, 167 N.E.2d 128, 131-32 (Ohio Ct.Cm.Pl. 1959) ("A restrictive covenant in a deed which requires the submission to and approval by the grantor of all plans for the erection of a house, but fails to define the standards to be applied or the scope of the inquiry to be made, is too vague to be enforceable") (internal quotes and cite omitted).

Finally, any resort McMaster would make to parol evidence "to ascertain the intent . . . only emphasizes [the "hunting" provision's] indefiniteness and proves its enforceability." Hitt, 194 Ga. App. at 656. The "hunting" clause therefore is unenforceable. This result also defeats any "charitable conveyance" exception McMaster might raise, under First Rebecca Church, 263 Ga. at 689-90, in response to the above "repugnancy" analysis. On these grounds, the reconsideration motion must be denied.

B. Merger Doctrine

McMaster next argues that the Court erred in interpreting Georgia law on merger. Given the public policy choices (e.g., free alienability and anti-forfeiture doctrines; O.C.G.A. § 44-5-60, which restricts many covenants to 20 years) embedded in Georgia property law, the Court is especially reluctant to consider the non-Georgia case law now advanced by plaintiff. And, while the Court commends plaintiff's counsel for their exemplary briefing, it nevertheless must disagree with the result they urge.

Conceding again that this area of Georgia law is not blessed with consistency, the Court concludes that collateral promises made between a real property vendor and vendee will ***not*** merge if they are (1) of relatively short duration; and (2) in terms of subject matter, significantly removed from the incidents of title and possession – i.e., they do not envelope, for example, the grant of part of an estate in land ("title") or restrictions on how one may possess or use the land itself ("possession").

That is why a builder's extra-deed promise to finish building a home on a piece of land he has just sold will not be deemed to merge, see Holmes v. Worthey, 249 Ga. 104, 105 (1982); see also Gaudet v. Starr, 215 Ga. App. 451, 452 (1996) (written termite damage repair promise made at closing did not merge), nor will a home buyer's promise to return to or purchase from the home seller furniture and belongings to the seller left behind at the time of closing. Binion v. Ivestor, 185 Ga. App. 759 (1988). Promises of this sort do not go to title or possession, and are of relatively short duration.

In contrast, a promise to convey part of an adjoining lot ***did*** relate to title or possession, and thus ***did*** merge, in Fields v. Davies, 235 Ga. 87 (1975); see also Jordan v.

Flynt, 240 Ga. 359, 362-63 (1977). While the Court joins plaintiff in finding no on-point Georgia case placing land-use promises of the kind involved here in the "title or possession" category, on balance it is reasonable to conclude that the purported "no-camping" covenant is properly classified as such. After all, that covenant is one of unstated (permanent?) duration, and it governs the way the estate conveyed can be used. It therefore implicates policies of free use, habitability and alienability.

Such covenant therefore stands close, both in logic and in law, to the partial conveyance promise held to have merged in Fields than the "build" exception highlighted in Holmes. In that sense, it may be said to be part of the conveyance promised by the pre-closing contract. See Grant v. Aulicky, 161 Ga. App. 817 (1982) (pre-closing promises in a contract "of which the conveyance is ***not*** a performance" can be found not to have merged, depending upon the parties' intent, which itself may be determined by extra-deed evidence; where such promises are "***other than*** those relating to ***title or possession***, and so far collateral thereto as to indicate that their omission from the deed was without any deliberate intent to preclude their survival of that instrument, such collateral provisions will be held to survive merger") (emphasis added).

Absent competent evidence of mutual intent showing that the "no-camping" covenant was to survive merger, the substance of that provision is a non-issue here. In his reconsideration motion, McMaster quarrels with the Court's conclusion as to what his anti-merger evidence shows. Although the FWS correctly points out that plaintiff cannot use a F.R.Div.P. 59(e) motion to re-argue his case, the Court – again out of an abundance of caution – will illuminate some controlling points.

First, it is undisputed that the grantors accepted the deed, and thus did not hold out for a collateral written agreement (or even a contemporaneous FWS letter reflecting the parties' intent that the "no-camping" covenant would not merge). See doc. # 36, Exh. 5 (FWS letter, written during negotiation period months before closing, announcing FWS's "intent . . . that camping will be prohibited," but failing to state for how long, much less whether such a promise would survive merger).[2] Nor did they insist upon more comprehensive language in the corresponding "no-hunting" deed clause (e.g., a standard determining ***what*** constitutes an "overabundance" or ***how*** such hunts would be "supervised"), which would have strengthened their contention that there was a mutual intent to carry a collateral, "no-camping" covenant beyond closing.

Second, McMaster again has failed to direct this Court to any competent evidence proving that the parties intended their collateral agreement to survive merger. See supra note 2. To that end, the Court agrees with the FWS, see doc. # 47 at 5, that the Gottschalk affidavit filed with McMaster's 6/6/97 reconsideration motion should not be considered. Plaintiff was placed on notice well before the Court's 5/23/97 Order that merger was an issue in this case. See doc. # 30 at 12 (FWS's summary judgment motion raising merger doctrine defense). Hence, he is misusing his F.R.Civ.P. 59(e) motion to proffer new evidence not shown to be previously unavailable. See 8 Wright, Miller & Kane, Fed. Prac. & Proc. § 2810.1 at 127-28 (1995); Lostumbo v. Bethlehem Steel, Inc., 8 F.3d 569, 570 (7th Cir. 1993).

In that vein, the Court further agrees that the affidavit is self-serving and contradictory to Gottschalk's deposition testimony. Compare doc. # 46, Exh. A ¶ 2, with

Gottschalk Dep. at 35-37. More importantly, it fails to establish a chain of facts showing explicit agreement on the merger issue by the time the transaction closed.

Third, the Court notes that in pre-deed correspondence, the FWS offered to provide a "provision in the deed providing for reversion of title" if a bridge or causeway were connected to the island. Doc. # 36 Exh 3 at 2 ("there is no objection to the deed of conveyance reciting the desire of the trustees that the general nature of the island be preserved . . . .[but t]his would not preclude . . . opening the refuge to public hunting"), see also Doc. # 36 Exh. 2 at 19. Hence, these sophisticated parties knew or should have known how to draft (i) a deed aimed at preserving the "no-camping" agreement reflecting their mutual intent that it would survive merger. McMaster's evidence fails to fill in this gap, nor raise an issue of fact. At most it shows that the FWS promised not to allow overnight camping, but did not commit to that indefinitely.

Finally, the Court agrees with plaintiff that he might have a Statute of Frauds argument, but only ***if*** it could be said that the "no-camping" covenant survived merger. See doc. # 476 at 14 n. 4 (citing to Grant 161 Ga. App. at 818). Grant simply restates the rule that where the parties intended their agreement to survive merger, it will not in fact merge, in which case one party can rely on the performance exception to a Statute of Frauds defense that might be raised in an effort to defeat an oral-agreement claim. In short, Grant does not alter the result reached here.

III. Conclusion

Accordingly, plaintiff Philip R. B. McMaster's "Motion For Reconsideration" and "Request for Oral Argu-

ment" (doc. # 45) are each **DENIED**.

SO ORDERED, this 28th day of July, 1997.

B. AVANT EDENFIELD, JUDGE
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

[1] Whether McMaster actually advanced this claim is debatable. While Count One is styled "Quiet Title Action" and, references the express deed covenant itself, it also encompasses the "no camping" allegations. See doc. # 1 at 18-19; see also id. ¶¶ 32 (incorporating "no camping" factual allegations); ¶ 33 (complaining that the FWS has "wrongfully asserted that [its] title . . . is not subject to any covenant against overnight ***camping***") (emphasis added). It bears little, if any indication, that it was designed to stand alone from the "no camping" covenant argument. Nevertheless, the Court will err on the side of caution and address McMaster's additional claim based on his "reconsideration-motion" reading of his Complaint.

[2] Neither Gottschalk nor McMaster could point to any evidence that, when the parties closed on 10/20/69, see doc. # 30, Exh. 2 at 1, five months after this 5/19/69 representation, they remained in mutual agreement on the no-camping promise, much less that it would survive merger. This omission is especially significant given: Gottschalk's acknowledgment that the FWS "couldn't accurately predict everything that might happen in the future," Gottschalk Dep. at 33; McMaster's admission that one FWS goal was not to "set a precedent," Doc. # 36, Exh. 1 (McMaster Aff. Exhs. F at 1-2 & G at 1-2); Gottschalk's inability to recall ever having seen the deed, Gottschalk Dep. at 33; and his agreement that, "[b]y not putting certain things in the deed . . .[he] did not want to limit the {FWS's] freedom of decision [in the future]." Id. at 35.

Further, in a 5/19/69 letter to M.S. Parmly (who funded the transaction), one of the grantor's representatives announced his intent to "include [in the deed] a [restricted hunting] condition" doc. # 36, Exh. 6, but at the same time omitted mention of the "no-camping" covenant (that is, he acknowledged the FWS's "stipulation that they will not prohibit camping," but failed to mention anything about duration or merger). While this letter – tendered by plaintiff – is hearsay, it cannot go unnoticed that it corroborates the FWS's contention that no competent evidence supports McMaster's anti-merger argument.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-9053

D. C. Docket No. CV496-104

PHILIP R. B. MCMASTER, Doctor,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Department of the Interior, Fish and
Wildlife Service, MOLLIE H. BEATTIE,
in her official capacity as Director,
United States Fish and Wildlife Service, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia
(May 28,1999)

Before BARKETT, Circuit Judge, KRAVITCH and
MAGILL*, Senior Circuit Judges.
*Honorable Frank J. Magill, Senior U.S. Circuit Judge
for the Eighth Circuit, sitting by designation.
MAGILL, Senior Circuit Judge:

Dr. Philip McMaster, a beneficiary of the Wassaw Island Trust ("Trust"), appeals the district court's grant of summary judgment in favor of the United States in connection with his action, brought under the Quiet Title Act, 28 U.S.C. § 2409a, alleging that the United States is breaching various written and oral covenants made in connection with its purchase of land formerly owned by the Trust. Because the district court lacked subject matter jurisdiction under the Quiet Title Act, we vacate its order of summary judgment and remand with instructions that the case be dismissed.

I.

The Wassaw Island Trust was originally formed in 1930 for the purpose of preserving Wassaw Island, Georgia, in its natural state. By 1969, the Trustees feared that the State of Georgia might condemn the island and open it to public use or development. Thus, Dr. McMaster, then a Trustee, began negotiating with Dr. John Gottschalk, director of the agency, now known as the Fish and Wildlife Service, to convey Wassaw Island to the United States for preservation purposes but to retain a portion of the island, known as the Home Parcel, for Trust beneficiaries. In a series of negotiations, Dr. Gottschalk orally agreed that the United States would not allow camping on the island and would not allow hunting on the island except when necessary to thin animal herds. These agreements were not memorialized in a formal written contract signed prior to the Trust's delivery of the deed.

Rather than conveying the land directly to the

United States, the Trust utilized a nonprofit organization known as the Nature Conservancy to facilitate the transaction. On October 20, 1969, the Trust conveyed Wassaw Island (except for the Home Parcel) to the Nature Conservancy for the price of one million dollars. Although the deed memorializing the transfer ("Trust Deed") contained several restrictive covenants, it expressly recited that the Trust was conveying the land to the Nature Conservancy "forever in fee simple." Trust Deed at 5. That same day, the Nature Conservancy deeded its portion of the island to the United States for one dollar. Unlike the Trust Deed, the deed from the Nature Conservancy to the United States ("Government Deed") was not in fee simple. Rather, the Government Deed provided that "[t]he title of the Grantee [(United States)] shall cease ... upon the ... [u]se of the Granted Premises for hunting. . . ." Government Deed at 3-4. The Government Deed also contained a reverter clause, providing that "the title shall revert in fee simple ... to the Grantor [(Nature in the event that the United States used Wassaw Island for hunting. Id. at 4. Dr. McMaster specifically chose this arrangement "to ensure that if for any reason the [United States's] title to the [land] should lapse, title would revert to a non-profit nature organization rather than to the Wassaw Island Trust." Complaint at ?22. Both deeds included a restrictive covenant that prohibited hunting on the island except in the case where it is "supervised by any governmental agency for the purpose of reducing an overabundance of any species of mammal." Trust Deed at 4; Government Deed at 4. Neither deed contained any prohibition on camping.

Since the United States acquired its portion of Wassaw Island, it has allegedly violated the oral no-camping promise and the written no-hunting restrictive covenant. Upset by this development, Dr. McMaster (now merely a

Trust beneficiary using the Home Parcel) filed suit against the government, seeking to enforce the oral promise and the written restrictive covenant. Notably, the Nature Conservancy, which purchased the island in fee simple from the Trust, is not a party to this action.

The government initially filed a motion to dismiss this action on the ground that the Quiet Title Act did not confer subject matter jurisdiction on the district court. When the court denied the government's motion, the government filed a motion for summary judgment, contending that (1) the no-camping promise was unenforceable because it did not survive the deed and (2) the no-hunting restrictive covenant constituted an unenforceable forfeiture provision. After analyzing the conveyances under Georgia law, the district court agreed with the government and entered summary judgment in its favor. Dr. McMaster now appeals.

II.

We do not address the merits of this appeal because we find that the district court lacked subject matter jurisdiction. "It is well established that the question of subject matter jurisdiction may be raised at any stage in the proceedings by any party or by the court on its own motion." Majd-Pour v. Georgiana Community Hosp., Inc., 724 F.2d 901, 902 (11th Cir. 1984).

"Federal courts exercise limited subject matter jurisdiction, empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution or otherwise authorized by Congress." Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994). "The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be

sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941) (citations omitted). The terms "upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." Soriano v. United States, 352 U.S. 270, 276 (1957).

Dr. McMaster bases subject matter jurisdiction solely upon the Quiet Title Act (" QTA"), 28 U.S.C. §2409a. The QTA provides that the "United States may be named as a party defendant in a civil action ... to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409a(a) (emphasis added). The QTA thus waives the United States' sovereign immunity and "permit[s] plaintiffs to name it as a party defendant in civil actions to adjudicate title disputes involving real property in which the United States claims an interest." Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 276 (1983); see also Gardner v. Stager 103 F.3d 886, 887 (9th Cir. 1996) (explaining that the QTA waives the sovereign immunity of the United States "for the purpose of determining title to real property"); State of Florida, Dep't of Bus. Regulation v. United States Dep't of Interior, 768 F.2d 1248, 1253 (11th Cir. 1985) ("With the enactment of the Quiet Title Act, Congress waived the United States' [sic] immunity with respect to certain kinds of lawsuits, allowing the United States to be named as a defendant in lawsuits seeking the adjudication of disputed title to land.").

"The meaning of the phrase 'adjudicate a disputed title' presents a federal question, the answer to which must be sought in federal law." United States v. Bedford Assocs., 657 F.2d 1300, 1316 (2d Cir. 1981). As the phrase itself demonstrates, there must be a dispute, and that dispute must

relate to "title to real property." 28 U.S.C. § 2409a(a). The dispute must not merely concern "title to real property" in the abstract, but must concern the quality of title between the plaintiff and the United States and not the quality of title between the United States and a third party. See Cadorette v. United States, 988 F.2d 215, 223 (1st Cir. 1993) (explaining that a QTA action "is, generally speaking, an in personam proceeding, the purpose of which is to determine which named party has superior claim to a certain piece of property" (citation omitted)); see also 28 U.S.C. § 2409a(e) (providing that district court does not have jurisdiction under the QTA if the United States' interest in the property is not adverse to the plaintiffs interest in the property). This is because "[i]f the plaintiff prevails, he can recover the land wrongly held by the United States." Cadorette, 988 F.2d at 223; see also LaFargue v. United States 4 F. Supp. 2d 580, 586 (E.D. La. 1998) ("[A] quiet title claim under the QTA disputes ownership and provides the landowner with a declaration of title and recovery of the land.").

In this case, the United States attacks the district court's subject matter jurisdiction, claiming that this suit was not brought "to adjudicate a disputed title to real property." 28 U.S.C. § 2409a(a). A defendant may attack subject matter jurisdiction in two different ways – facially and factually. Lawrence v. Dunbar, 919 F.2d 1525, 1528-29 (11th Cir. 1990) (per curiam). Facial attacks' on the complaint 'require the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true . . . .'" (citation omitted)). Here, Dr. McMaster pleaded that he has easement rights to the United States' portion of Wassaw Island, including the right to "pass and repass on foot, carriage, bicycle or motor vehicle the roads and pathways thereof." Trust Deed at 3. He also pleaded that the United States has

impermissibly interfered with his easement rights by forbidding him from using these roads and pathways. See Complaint at ¶ 36. These pleadings would survive a facial attack. Cf.. County of Patrick, Va. v. United States, 596 F.2d 1186, 1187 (4th Cir. 1979) (jurisdiction not questioned under the QTA where plaintiffs alleged "wrongful interference by the United States with their use and enjoyment of an appurtenant easement").

Although Dr. McMaster's complaint survives a facial attack, the United States here is making a factual attack on the district court's subject matter jurisdiction. "'Factual attacks,' . . . challenge 'the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.'" Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) (per curiam) (citation omitted). "'[N]o presumptive truthfulness attaches to plaintiffs allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'" Id. (citation omitted). In response to a factual attack, a court should dismiss the complaint for lack of subject matter jurisdiction "where the federal claim is clearly immaterial or insubstantial.'" Id. (citation omitted).

After reviewing the voluminous record in this case, we hold that Dr. McMaster's allegations do not withstand the government's factual attack on subject matter jurisdiction. As explained above, we determine whether this lawsuit survives the government's factual attack by looking to matters outside the pleadings and we do not accord any presumptive truthfulness to the allegations in the complaint. See Lawrence 919 F.2d at 1529. Here, Dr. McMaster has never presented any argument to either the district court or this court concerning the United States' alleged interference

with his easement rights. Rather, Dr. McMaster has focused his arguments, both below and on appeal, solely on the issue of whether the no-camping oral agreement and the no-hunting restrictive covenant are enforceable. The district court granted summary judgment in favor of the government based solely on its determination that Dr. McMaster could not enforce either covenant. The district court never considered whether the government was interfering with Dr. McMaster's easement rights, and Dr. McMaster never requested the district court to make such a determination. On appeal, Dr. McMaster challenges only the district court's conclusions as to the enforceability of the covenants. He does not suggest that the district court should have made any findings with respect to his easement rights and he does not argue that such an adjudication s necessary or desired. Notwithstanding the allegations in his complaint, therefore, it is clear that the sole dispute here concerns the enforceability of the covenants. Even assuming Dr. McMaster has not abandoned his claim that the United States is interfering with his easement by failing to ever argue that claim, his conduct demonstrates that he deems this claim insubstantial. Therefore, his pleaded claim that the United States interfered with his easement rights does not withstand the United States' factual attack on jurisdiction.

Accordingly, the question here is whether the no-hunting restrictive covenant in the Trust Deed and the alleged oral no-camping promise made by Dr. Gottschalk (on behalf of the United States) to Dr. McMaster create a "disputed title to real property" as between Dr. McMaster and the United States. The answer is no.

Courts have typically "equated the requirement of a disputed title with disputed ownership." Dunbar Corp. v. Lindsey, 905 F.2d 754) 759 (4th Cir. 1990); see also Pai

Ohana v. United States, 875 F. Supp. 680, 693 (D. Haw. 1995) ("The word 'title' as used in 28 U.S.C. § 2409a connotes an ownership interest."), aff'd, 76 F.3d 280 (9th Cir. 1996); Landow v. Carmen, 5 5 5 F. Supp. 195, 197 (D. Md. 1983) (same); cf. Black's Law Dictionary 1485 (6th ed. 1990) (defining "title" in context of real property law as "[t]he formal right of ownership of property" or "[t]he right to or ownership in land"). Taken literally, therefore, the words of the statute "permit adjudications only when the title or ownership of real property is in doubt" as between the plaintiff and the United States.[1] Cadorette, 988 F.2d at 223; see also Landow, 555 F. Supp. At 197 (canvassing existing case law and explaining that "this Court is not aware of any case holding that a dispute about a non-ownership interest is sufficient to confer Quiet Title Act jurisdiction").

We hold that the present dispute between Dr. McMaster and the United States concerning the covenants fails to call into question either the title to or the ownership of Wassaw Island as between Dr. McMaster and the United States. The United States received the land from the Nature Conservancy, which received the land "forever in fee simple" from the Trust. Trust Deed at 5. The Trust Deed did not include any power of reverter in favor of the Trust or its beneficiaries which would operate in the event that the Nature Conservancy or the United States breached a restrictive covenant. Dr. McMaster, as a beneficiary of the Trust, does not and cannot claim that the government's alleged breach of these covenants somehow gives him or the Trust title rights or ownership rights to the United States' portion of Wassaw Island. See Complaint at 122 (Dr. McMaster specifically chose the conveyance arrangement between the Trust, the Nature Conservancy and the United States "to ensure that if for any reason the [United Sates'] title to the [land] should lapse, title would revert to a non-profit nature organization

rather than to the Wassaw Island Trust."); cf. Prater v. United States, 618 F.2d 263, 263 (5th Cir. 1980) (per curiam) (explaining that jurisdiction existed under the QTA where the plaintiff "asserted equitable title to the realty, under Georgia trust law" and the court was called upon to adjudicate whether the plaintiff, in fact, had such equitable title). Certainly, Dr. McMaster has not pointed to any authority suggesting that this court may grant him the typical relief awarded to a prevailing plaintiff under the QTA -- an order that he has a superior claim to the United States's portion of Wassaw Island than that of the United States or that he is entitled to the United States' portion of Wassaw Island.

In essence, "the only dispute between the parties concerns the terms of a[n] ... agreement which does not call into question the ownership of real property" vis-a-vis the two parties. Landow, 555 F. Supp. at 197; see also Ginsberg v. United States, 707 F.2d 91, 93 (4th Cir. 1983) (holding that there is no jurisdiction under the QTA in "situations where there is privity of contract between the United States ... and [plaintiff], since the dispute over an alleged breach of contract [(a rental agreement whereby the United States occupied and used plaintiffs building)] hardly casts doubt on the title or ownership of the property"). Regardless of whether the United States breached the no-camping promise or the no-hunting restrictive covenant, there is no doubt that, as between the United States and Dr. McMaster, the United States still owns and retains title to its portion of Wassaw Island and Dr. McMaster has easement rights with respect to that portion of Wassaw Island. Because the no-camping promise and the no-hunting restrictive covenant do not create a disputed title to real property between Dr. McMaster and the United States, we find the QTA does not confer jurisdiction over Dr. McMaster's breach-of-covenant claims against the United States.

III.

For the foregoing reasons, we VACATE the district court's award of summary judgment in favor of the United States and REMAND this matter to the district court with instructions to dismiss this action for lack of subject matter jurisdiction.

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[1] Relying on 28 U.S.C. § 2409a(d), Dr. McMaster argues that he must merely demonstrate that he has some "right, title, or interest...in the real property" to bring suit under the QTA and that he need not demonstrate that there is some dispute between the parties concerning his right, title or interest in the real property. 28 U.S.C. § 2409a(d). This argument overlooks the fact that § 2409a(d) sets forth the pleading requirements for an action brought pursuant to the QTA, while § 2409a(a) provides the jurisdictional parameters of the QTA.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT
Filed: September 1, 1999

No. 97-9053

PHILIP R. B. MCMASTER, Doctor,

Plaintiff-Appellant
versus

UNITED STATES OF AMERICA, Department Of the Interior, Fish and Wildlife Service, MOLLIE H. BEATTIE, in her official capacity As Director, United States Fish and Wildlife Service, JOHN G. ROGERS, in his official capacity as Deputy Director, United States Fish and Wildlife Service, NOREEN K. CLOUGH, in her official capacity as Regional Director, United States Fish and Wildlife Service, SAM O. DRAKE, JR., in his official capacity as Refuge Manager, Savannah Coastal Refuge, United States Fish and Wildlife Service,

Defendants-Appellees.

On Appeal from the United States District Court for the

Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F2d._____).

Before: BARKETT, Circuit Judge KRAVITCH and MAGILL*, Senior Court Judges.

PER CURIUM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

ORD-42

(6/95)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action
No. CV-496-104

PHILIP R. B. MCMASTER, Doctor,

Plaintiff

v.

UNITED STATES OF AMERICA, Department Of the Interior, Fish and Wildlife Service, MOLLIE H. BEATTIE[1], in her official capacity As Director, United States Fish and Wildlife Service, JOHN G. ROGERS, in his official capacity as Deputy Director, United States Fish and Wildlife Service, NOREEN K. CLOUGH, in her official capacity as Regional Director, United States Fish and Wildlife Service, SAM O. DRAKE, JR., in his official capacity as Refuge Manager, Savannah Coastal Refuge, United States Fish and Wildlife Service,

Defendants.

MOTION TO DISMISS

COMES NOW the defendants, by and through their counsel of record, and move this Court pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss plaintiff's action on the grounds that this Court lacks subject matter jurisdiction.

Respectfully submitted,

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[1] Mollie H. Beattie passed away in July, 1996. No successor to Ms. Beattie has been named. Fed. R. Civ. P. 25(d). (See Defendants' Notice of Automatic Substitution of Public Officers).

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action
No. CV-496-104

PHILIP R. B. MCMASTER, Doctor,

Plaintiff

v.

UNITED STATES OF AMERICA, Department Of the Interior, Fish and Wildlife Service, MOLLIE H. BEATTIE[1], in her official capacity As Director, United States Fish and Wildlife Service, JOHN G. ROGERS, in his official capacity as Deputy Director, United States Fish and Wildlife Service, NOREEN K. CLOUGH, in her official capacity as Regional Director, United States Fish and Wildlife Service, SAM O. DRAKE, JR., in his official capacity as Refuge Manager, Savannah Coastal Refuge, United States Fish and Wildlife Service,

Defendants.

BRIEF IN SUPPORT of MOTION TO DISMISS

INTRODUCTION

Defendant United States Fish and Wildlife Service ("FWS") manages a portion of Wassaw Island, Georgia located eleven miles southeast of Savannah, as part of a national wildlife refuge. FWS acquired the portion of Wassaw Island through a series of conveyances made in 1969. The Wassaw Island trust ("Trust"), which had fee-simple ownership, conveyed to the Nature Conservancy in fee simple. The Nature Conservancy conveyed to FWS in fee simples defeasible. The deed specifically requires that defendants mange the granted portion as a fish and wildlife refuge. (Federal Defendants' Exhibit 1 at p.3).

As part of its management duties on Wassaw Island, FWS must hold hunts when deer herd health and island habitat suffer because of overabundance of deer. The deed to FWS explicitly acknowledges that hunting to reduce an overabundance of any species of mammal is a required aspect of management of the island as a wildlife refuge. Id.

I. FACTUAL BACKGROUND

The 1969 Conveyance

In 1969, the Wassaw Island Trust conveyed all but 180 acres of Wassaw Island to the Nature Conservancy for one million dollars. The deed to the Nature Conservancy imposed several restrictions on the "granted premises," such as a prohibition against hunting, unless necessary to reduce species overabundance, and a requirement that the granted premises be "managed as a part of the National Wildlife Refuge System, and for studies pertaining thereto and for no purpose inconsistent therewith;..." (Federal Defendants' Exhibit 2 at pp. 3-5). The deed did not place any restrictions

on overnight camping on the deeded portion of the island.

The deed also prohibited commercial, industrial, or military uses of the island, except during time of war declared by Congress. Id. No roadway or bridge could be built between the island and any other place and no motor vehicles could operate on the island except those belonging to land owners on the island. Id.

The 180 acres that were not conveyed to defendants were reserved to the Trust. This inholding, referred to as a "Home Parcel" in the deed, was also subject to the restrictions against use of motor vehicles and construction of a roadway or bridge. Also, the home parcel could be used only for residential purposes and as a refuge for fish and wildlife and for no purpose inconsistent therewith. The home parcel also reserved certain easements appurtenant in the granted premises.[2]

Both the restrictions placed on the granted premises, and the easements appurtenant, related to the use and mode of enjoyment of the land on the island. Thus, the restrictions and easements "ran with the land" and subsequent owners of both the home parcel and the granted premises took title subject to these restrictions and easements. O.G.C.A. §44-5-60(a), (c); Tenstate Distribution Co. v. Averett, 397 F. Supp. 1227, 1231 (N.D. Ga. 1975); Johnson v. Meyers, 226 Ga. 23, 25-26, 172 S.E.2d 421, 423-424 (1970); Smith v. Pinder Real Estate Co., 187 Ga. 229, 234-235, 200 S.E. 131, 134-135 (1938) (defining the term "run[ning]" with the land).

On the same date (October 20, 1969) that the Trust conveyed a portion of Wassaw Island to the Nature Conservancy, the same portion of Wassaw Island was conveyed by

the Nature conservancy to FWS for the consideration of one dollar. (Federal Defendants' Exhibit 1). FWS's title was subject to the same restrictions and easements as the Nature Conservancy's title. (Federal Defendants' Exhibit 1 at pp.2-3). Moreover, the deed to the FWS explicitly stated that the conveyance to the FWS was for the purpose of "creating a fish and wildlife refuge" and that the deeded portion would be maintained "as nearly practicable in its natural state." (Federal Defendants' Exhibit 1 at p.3). FWS placed its portion of Wassaw Island into the Wassaw Island National Wildlife Refuge, which is also comprised of Pine Island and Little Wassaw Island.

Like the deed from the Trust to the Nature Conservancy, the deed from the Nature Conservancy to the FWS did not contain any restriction on overnight camping on the deeded portion of Wassaw Island. Unlike the deed to the Nature Conservancy, however, the deed to the FWS expressly made title subject to certain conditions.[3] (Federal Defendants' Exhibit 1 at pp. 3-4). The deed provided that the happening of any of the prohibited events would cause title to revert in fee simple to the Grantor, the Nature Conservancy. (Federal Defendants' Exhibit 1 at pp. 1, 3-4).

II. ARGUMENT

In order to assert jurisdiction in federal court, a plaintiff must rely upon federal question or diversity jurisdiction.[4] 28 U.S.C. §§1331, 1332. Federal question jurisdiction requires invocation of the Constitution or a federal law or treaty. 28 U.S.C. §1331. Plaintiff has cited the federal Quiet Title Act in his complaint. 28 U.S.C. §2409a. this federal law, however, does not confer jurisdiction on this Court for two separate reasons: Plaintiff has not properly pled a quiet title claim nor does plaintiff have standing

under the federal Quiet Title Act.

A. PLAINTIFF HAS NOT PROPERLY PLED A QUIET TITLE ACTION.

Federal jurisdiction is analyzed with reference to the well-pleaded complaint rule. Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 9-10 (1983). To invoke federal jurisdiction, there must be a "substantial question of federal law in dispute between the parties" or "the vindication of a right under state law [must] necessarily turn on some construction of federal law." Id. at 9,13; Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1467 (11th Cir. 1987). Plaintiff's complaint must allege that defendant violated some federal law. Hill v. Marston, 13 F.3d 1548, 1550 (11th Cir. 1994). Moreover, the allegations must be grounded "in substance" and not in "mere form." Spaulding v. Mingo county Bd. of Education, 897 F. Supp. 284, 287 (S.D.W. Va. 1995). The "mere existence of a disputed issue of federal law does not necessarily confer federal question jurisdiction." Id.; Rather, the federal law issue must be an "'essential'" element of plaintiff's case and the dispute "'genuine and present'" and not merely "'conjectural'". Bender v. Prudential Ins. Co. of America, 860 F. Supp. 803, 805 (M.D. Ala. 1994) citing Gully v. First Nat'l Bank in Meridian, 299 U.S. 109 (1936).

In a quiet title action, each party must plead and prove his or her own claim to the property in question and plaintiff's right to relief depends on superiority of title. Yokeno v. Mafnas, 973 F.2d 803, 808 (9th Cir. 1992). The language of 28 U.S.C. §2409a requires that a claim involve "a disputed title to real property in which the United States claims an interest..." Ginsberg v. United States, 707 F.2d

91, 93 (4th cir. 1983) quoting 28 U.S.C. §2409a; Cadorette v. United States, 988 F.2d 215, 223 (1st Cir. 1993) (noting that the words of the statute permit adjudications only when the title or ownership of real property is at issue). A breach of contract claim, for example, does not involve a dispute as to title and does not properly belong under the Quiet Title Act. Ginsberg, 707 F.2d at 93.

In this case, plaintiff has not pled the individual elements of 28 U.S.C. §2409a but has merely asserted a quiet title claim. Plaintiff's complaint at ¶¶32-37. Moreover, plaintiff has not disputed that the United States properly holds title nor has plaintiff sought rescission of the title so that it vests in himself individually or in any representative capacity. It is, therefore, clear that plaintiff has not properly pled an action under the federal Quiet Title Act and jurisdiction based on that federal statute is lacking.

B. PLAINTIFF DOES NOT HAVE STANDING TO BRING A QUIET TITLE ACTION

Even if plaintiff had properly pled a claim under 28 U.S.C. §2409a, plaintiff does not have standing to bring such a claim. The principle of standing is "'derived from the Article III limits on the jurisdiction of federal courts.'" Cuban American Bar Ass'n Inc. v. Christopher, 43 F.3d 1412, 1422 (11th Cir. 1995) citing Jackson v. Okaloosa County, 21 F.3d 1531, 1536 (11th Cir. 1994). To establish standing, a plaintiff must have "'suffered an injury in fact that would be corrected by [a] favorable decision in a lawsuit'", Church v. City of Huntsville, 30 F.3d 1332, 1335 (11th Cir. 1994) citing Cheffer v. McGregor, 6 F.3d 705, 708 (11th Cir. 1993). There are two recognized components to the standing doctrine: the minimum constitutional requirements of Article III and the prudential considerations

of judicial self-government. Cuban American Bar Ass'n Inc., 43 F.3d at 1423 citing Harris v. Evans, 20 F.3d 1118, 1121 (11th Cir.) (en banc), cert. Denied 115 S.Ct. 641 (1994). The Supreme Court has identified three constitutional requirements which must be satisfied in order for a plaintiff to have standing:

> **First**, the plaintiff must have suffered an "injury in fact"- - an invasion of a legally-protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or "hypothetical.'". **Second**, there must be a causal connection between the injury and the conduct complained of - - the injury has to be "fairly ... trace[able] to the challenged action of the defendant and not ...[t]he result [of] the independent action of some third [party not before the court." **Third**, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted); see, Harris, 20 F3d at 1121 (must show actual or threatened injury that is fairly traceable to challenged conduct and which is likely to be redressed by a favorable ruling); Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 805 (11th Cir 1993). In addition to these constitutional requirement, the federal courts have also imposed prudential limits on their exercise of jurisdiction. Church, 30 F.3d at 1335-36; Alcock, 993 F.2d at 805. These "self-imposed restraints" include:

> **[(1)]** the principle that federal courts should

> avoid deciding generalized grievances that present abstract questions of wide public significance, **[(2)]** the requirement that the plaintiff's complaint be within the zone of interests protected by the statute or the requirement that a plaintiff...assert his own legal rights and interests, not the rights of third parties. Cone Corp v. Florida Dep't of Transp., 921 F.2d 1190, 1203 n. 43 (11th Cir.) (internal quotations and citations omitted), cert. denied, 500 U.S. 942, 111 S.Ct. 2238, 114 L.Ed. 2d 479 (1991).

Church, 30 F.3d at 1335-36; Cuban American Bar Ass'n Inc., 43 F.3d at 1423.

In this particular case, plaintiff does not dispute that title properly belongs in the United States nor does plaintiff seek rescission of the title to himself. Moreover, plaintiff cannot bring an action seeking rescission of the title because he does not have, nor does he represent any one who has, a reversionary interest in the title.

The Nature Conservancy took title from the Trust in fee simple, because the deed did not place any limitations on the title. (Federal Defendants' Exhibit 2; O.G.C.A. §44-6-20; Floyd v. Hoover, 141 Ga. App. 588, 591, 234 S.E.2d 89, 92-93 (1977)). Thus, the Trust conveyed full title to the Nature Conservancy and did not retain a reversionary interest in the title.

The conveyance from the Nature Conservancy to the FWS, however, was a fee simple defeasible because the deed explicitly placed certain conditions on FWS's title, the violation of which would result in cessation of the title.

(Federal Defendants' Exhibit 1 at pp. 3-4; O.G.C.A. §44-6-40; Floyd, 141 Ga. App. at 5912, 234 S.E.2d at 92-93; Flaum v. Middlebury, 246 Ga. App. 682, 272 S.E.2d 695 (1980); Hardman v. Dahlonega-Lumpkin County Chamber of Commerce, 238 Ga. 551, 553-54, 233 S.E.2d 753, 755-56 (1977); Georgia, Ashburn, Sylvester & Camilla Ry. Co. v. Johnson, 226 Ga. 358, 360, 174 S.E.2d 895, 897 (1970).

If the FWS breaches one of the conditions to which its title is subject, title will revert to the Nature Conservancy, not to plaintiff.[5] Because title would not revert to plaintiff, plaintiff does not have an interest that would be "redressed by a favorable decision" of this Court. Lujen, 504 U.S. at 560; Harris v. Evans, 20 F.3d 1118, 1121 (11th Cir.) (en banc), cert. denied 115 S.Ct. 641 (1994). Moreover, plaintiff is not asserting his own rights but those of the Nature Conservancy, a third party. Harris, 20 F.3d at 1121; Church, 30 F.3d at 1335-36. Therefore, plaintiff cannot satisfy one of the three requirements needed to assert Article III standing nor can plaintiff meet one of the three prudential limits on standing. Lujen, 504 U.S. at 560; Church 30 F.3d at 1335-36. thus, plaintiff does not have standing to bring an action under the federal Quiet Title Act. Id.

C. THE DISTRICT COURT SHOULD EXERCISE ITS DISCRETION AND DISMISS THE REMAINING STATE LAW CLAIMS.

As to the remaining state law claims of breach of covenant, breach of implied trust, promissory estoppel, and equitable estoppel, this Court will not have independent original federal jurisdiction over them if it dismisses plaintiff's federal claim. Fallin v. Mindis Metals Inc., 865 F. Supp. 834, 841 (N.D. Ga 1994). Assuming these ate not merely remedies sought as a result of invoking the federal

Quiet Title Act, this Court would have supplemental jurisdiction over plaintiff's state law claims pursuant to 29 U.S.C. §1367. Supplemental jurisdiction is properly asserted "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. §1367(a) If the state law claim arises from the same facts as the federal claim and involves similar occurrences, witnesses, or evidence, then the former is likely part of the same case or controversy as the latter. Palmer v. Hospital Auth. of Randolph County, 22 F.3d 1559, 1566 (11th Cir. 1994); Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 455 (11th Cir. 1996); Burns-Toole v. Byrne, 11 F.3d 1270, 1276 (5th Cir. 1994).

Plaintiff's state law claims are based on the same set of facts and contentions as his federal quiet title action and implicate the same occurrences, witnesses, and evidence that the federal claim does. Plaintiff's state law claims are part of the same case or controversy as his federal claim. Hudson, 90 F.3d at 455; Palmer, 22 F.3d at 1566; Burns-Toole, 11 F.3d at 1276.

While this Court has supplemental jurisdiction over plaintiff's state law claims, under certain circumstances, this Court also has discretion to decline the jurisdiction. 28 U.S.C. §1367(c); Palmer, 22 F.3d at 1569; Fallin, 865 F. Supp. at 841.

Under the provisions of 28 U.S.C. §1367(c)(3), dismissal of plaintiff's count premised on the federal Quiet Title Act affords this Court discretion on whether to dismiss the supplemental state law claims. 28 U.S.C. §1367(c)(3); Palmer, 22 F.3d at 1568. As explained by the Palmer court:

> Section 1367(c) gives a court discretion to dismiss a supplemental claim or party when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. §1367(c)(3).

Id. (emphasis is that of Palmer court). It has been noted that district courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state claim once all federal claims are dismissed. Noble v. White, 996 F.2d 797, 799 (5th Cir. 1993); Shanaghan v. Cahill, 58 F.3d 106, 109 (4th Cir. 1995). As the Noble court recited, the commentary to Section 1367(c)(3) explains:

> The idea here is that once the crutch is removed – the claim that supports the supplemental jurisdiction of the other claim or claims – the other should not remain for adjudication…[J]udicial discretion here is a particularly important element. Here the 'may' in 'may decline' has a major role to play. 28 U.S. C. §1367 Practice Commentary (West Supp. 1993).

Noble, 996 F.2d at 799; Pearson v. Ford Motor Co., 865 F. Supp. 1504, 1515 (N.D. Fla. 1994), aff'd, 68 F.3d 1301 (11th Cir. 1995).

It is not when all of the federal claims are dismissed before trial for a federal court to decline to exercise supplemental jurisdiction over the remaining state claims. New England Co. v. Bank of Gwinnet County, 891 F. Supp. 1569, 1577-78 (N.D. Ga. 1995) (relying upon 28 U.S.C. §1367(c)(3) to decline to exercise jurisdiction over state claims) Childree v. UAP/GA Associacao Dos Industriais

de Cordoaria e redes v. United States, 828 F. Supp. 978, 987-88 (CIT 1993) (invoking 28 U.S.C. §1367 (c)(3)); Lewis v. United States, 812 F. Supp. 620, 624-25 (E.D.Va. 1993).

For the reasons expressed herein, the court should exercise its discretion under 28 U.S.C. §1367(c)(3) and dismiss the remaining state law claims.

Dated: September 12th, 1996

Respectfully submitted,

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[1] Mollie H. Beattie passed away in July, 1996. No successor to Ms. Beattie has been named. Fed. R. Civ. P. 25(d). (See Defendants' Notice of Automatic Substitution of Public Officers).

[2] In particular, users of the home parcel were able to pass and repass on foot, with limits on the number of vehicles that could be retained on the home parcel. Users were also able to take oysters from the creeks and rivers for consumption on the home parcel and to use oyster shells from the edge of Wassaw Sound for improvements of the roads on the home parcel and granted premises. Finally, the home parcel reserved an easement to use dead and down trees for firewood for home consumption only.

[3] The conditions upon which FWS's title would "cease and determine" were use of the Granted Premises for any industrial, commercial, or military purpose, except during time of war declared by Congress, the construction of a roadway or bridge from the granted premises to any other place, and hunting or lumbering on the island, except to the extent necessary to reduce species overabundance. (Federal Defendants' Exhibit 1 at pp. 3-4).

[4] Plaintiff is not able to meet the requirements for diversity jurisdiction because the United States is a party. Therefore, diversity jurisdiction is not available to plaintiff in this litigation as a basis for jurisdiction.

[5] Even if the deed from the Trust to the Nature Conservancy had retained a reversionary interest so that title would revert to the Trust, plaintiff is not a trustee nor is he representing the Trust in any manner and, therefore, plaintiff would not have standing to bring a quiet title action.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

DR. PHILIP R. B. MCMASTER

Plaintiff,

v.

CV 496-104

UNITED STATES OF AMERICA,
DEPARTMENT OF INTERIOR,
FISH AND WILDLIFE SERVICE,
et. al.,

Defendants.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Dr. Phillip R.B. McMaster, the Plaintiff in the above-styled action, by and through his undersigned counsel, and moves the Court to grant partial summary judgment in his favor on Counts II and V of his Complaint. In support of this motion, Dr. McMaster expressly relies on and incorporates herein the following:

1. All pleadings of record;

2. All discovery requests and responses thereto;

3. Deposition transcript of Dr. John Gottschalk;

4. Plaintiff's Statement of Material Facts as to Which There Exist No Genuine Issues To Be Tried; and

5. Plaintiff's Brief in Support of Motion for Partial Summary Judgment.

WHEREFORE, pursuant to Fed. R. Civ. P. 56 and 28 U.S.C. §§ 2201 and 2202, Dr. McMaster requests that the Court grant his Motion for Partial Summary Judgment holding that as a precondition to its acquiring the property which is now the Wassaw Island Wildlife Refuge, the United States Fish and Wildlife Service (formerly the Bureau of Sport Fisheries and Wildlife) entered into a binding agreement to prohibit camping and campfires in the wildlife refuge, that it is equitably estopped from denying the existence of that agreement, and that it has breached the agreement; and further compelling the government henceforth to abide by the agreement through entry of an injunction prohibiting government sponsored camping and campfires, and preserving this Court's jurisdiction to enforce the agreement; and further granting such other relief as the Court deems just and equitable, including costs and reasonable attorney's fees.

This 31st day of March, 1997

HUNTER, MACLEAN, EXLEY & DUNN, P.C.

BY:_____
Glen M. Darbyshire, Esq.
State Bar No. 205210